SUPREME COURT
OF THE UNITED STATES

No. 09-1478	
Vide 09-1454	
Title	James Alford, Deputy Sheriff, Deschutes County, Oregon, Petitioner v. Sarah Greene, et al.
Docketed	June 4, 2010
Lower Ct.	United States Court of Appeals for the Ninth Circuit
Case Nos.	(06-35333)
Decision Date	December 10, 2009
Rehearing Denied	March 1, 2010
Questions Presented	

---Date---	--------Proceedings and Orders----------
Jun 1 2010	Petition for a writ of certiorari filed. (Response due July 6, 2010)
Jun 24 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the petitioner.
Jun 29 2010	Consent to the filing of amicus briefs, in support of either party or of neither party, received from counsel for the respondent.
Jul 6 2010	Brief amicus curiae of Steve Cooley, District Attorney for Los Angeles County on behalf of Los Angeles County filed.
Jul 7 2010	Order extending time to file response to petition to and including August 2, 2010.
Aug 2 2010	Brief of respondents Sarah Greene, personally and as next friend of S.G., a minor, and K.G., a minor in opposition filed. VIDED
Aug 18 2010	DISTRIBUTED for Conference of September 27, 2010.
Oct 4 2010	DISTRIBUTED for Conference of October 8, 2010.
Oct 12 2010	Petition GRANTED. The petition for a writ of certiorari in No. 09-1454 is granted. The cases are consolidated and a total of one hour is allotted for oral argument.
Nov 10 2010	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents. VIDED
Nov 10 2010	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioner.
Nov 17 2010	The time within which to file the joint appendix and petitioners' briefs on the merits is extended to and including December 10, 2010. VIDED
Dec 9 2010	Joint appendix filed. Statement of costs filed. VIDED
Dec 9 2010	Brief of petitioner Bob Camreta filed. VIDED
Dec 10 2010	Brief of petitioner James Alford, Deschutes County Deputy Sheriff filed. VIDED
Dec 16 2010	Brief amici curiae of National Association of Social Workers, et al. filed. VIDED
Dec 16 2010	Brief amicus curiae of Cook County Public Guardian in support of neither party filed. VIDED
Dec 17 2010	Brief amici curiae of Los Angeles County, et al. filed.
Dec 17 2010	Brief amici curiae of California State Association of Counties, et al. filed. VIDED.
Dec 17 2010	Brief amicus curiae of Children's Advocacy Institute in support of neither party filed. VIDED.
Dec 17 2010	Brief amici curiae of Arizona, et al. filed. VIDED.
Dec 17 2010	Brief amici curiae of District Attorneys of San Diego County, et al. filed. VIDED.
Dec 17 2010	Brief amicus curiae of Center on the Administration of Criminal Law filed. VIDED. (Distributed)
Dec 17 2010	Brief amici curiae of National School Boards Association, et al. filed. VIDED.

Dec 17 2010	Brief amicus curiae of the United States filed. VIDED.
Dec 23 2010	SET FOR ARGUMENT ON Tuesday, March 1, 2011.
Dec 28 2010	The time to file respondents' brief on the merits is extended to and including January 24, 2011. VIDED.
Jan 7 2011	CIRCULATED.
Jan 21 2011	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. VIDED.
Jan 24 2011	Brief of respondents Sarah Greene, Personally and as Next Friend for S. G., a Minor, and K. G., a Minor filed. VIDED. (Distributed)
Jan 24 2011	Record received from U.S.C.A. for 9th Circuit. (1 envelope)
Jan 24 2011	Record from U.S.D.C. for the District of Oregon is electronic.
Jan 26 2011	Brief amicus curiae of Society of Catholic Social Scientists filed. VIDED. (Distributed)
Jan 27 2011	Brief amicus curiae of Center for Individual Rights filed. VIDED. (Distributed)
Jan 28 2011	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed. VIDED. (Distributed)
Jan 28 2011	Brief amici curiae of Pacific Justice Institute, et al. filed. VIDED. (Distributed)
Jan 31 2011	Brief amici curiae of Battered Women's Resource Center, et al. filed. VIDED. (Distributed)
Jan 31 2011	Brief amici curiae of Family Research Council, et al. filed. VIDED. (Distributed)
Jan 31 2011	Brief amici curiae of Juvenile Law Center, et al. filed. VIDED. (Distributed)
Jan 31 2011	Brief amici curiae of Center for Law and Education, et al. filed. VIDED. (Distributed)
Jan 31 2011	Brief amici curiae of Family Defense Center filed. VIDED. (Distributed)
Jan 31 2011	Brief amicus curiae of Liberty Counsel filed. VIDED. (Distributed)
Jan 31 2011	Brief amicus curiae of Legal Services for Children filed. VIDED. (Distributed)
Jan 31 2011	Brief amici curiae of New York University School of Law Family Defense Clinic, et al. filed. VIDED. (Distributed)
Jan 31 2011	Brief amici curiae of Legal Aid Society, et al. filed. VIDED. (Distributed)
Jan 31 2011	Brief amicus curiae of Eagle Forum Education & Legal Defense Fund, Inc. filed. VIDED. (Distributed)
Jan 31 2011	Brief amici curiae of American Family Rights Association, et al. filed. VIDED. (Distributed)
Jan 31 2011	Brief amici curiae of Loyola Civitas Childlaw Center, et al. filed. VIDED. (Distributed)
Jan 31 2011	Brief amicus curiae of Children's Law Section of the State Bar of Michigan filed. VIDED. (Distributed)
Jan 31 2011	Brief amicus curiae of The Rutherford Institute filed. VIDED. (Distributed)
Feb 18 2011	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 18 2011	Reply of petitioner Bob Camreta filed. VIDED. (Distributed)
Feb 22 2011	Reply of petitioner James Alford, Deputy Sheriff, Deschutes County, Oregon filed. VIDED. (Distributed)
Mar 1 2011	Argued. For petitioners John R. Kroger, Attorney General, Salem, Ore.; and Leondra R. Kruger, Acting Principal Deputy Solicitor General, Department of Justice, Washington, D.C. (for United States, as amicus curiae.) For respondents: Carolyn A. Kubitschek, New York, N.Y.

Supreme Court, U.S.
FILED

No. _____ 091478 JUN 1 - 2010

OFFICE OF THE CLERK

In The
Supreme Court of the United States

JAMES ALFORD,
DESCHUTES COUNTY DEPUTY SHERIFF,

Petitioner,

v.

SARAH GREENE, personally and as
next friend for S.G., a minor, and K.G., a minor,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

CHRISTOPHER DENNIS BELL
Counsel of Record
Assistant Legal Counsel
STEVEN EDWARD GRIFFIN
Assistant Legal Counsel
OFFICE OF DESCHUTES COUNTY LEGAL COUNSEL
1300 NW Wall Street, Suite 205
Bend, OR 97701
541-388-6624
christopher_bell@co.deschutes.or.us
steven_griffin@co.deschutes.or.us

Attorneys for Petitioner
Deschutes County Deputy Sheriff James Alford

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

This case presents a federal constitutional question of exceptional importance concerning the scope of the Fourth Amendment's protections when applied to interviews of suspected child abuse victims at public schools. Here, child protective services and a local law enforcement agency received a report that a nine-year old girl was being sexually abused by her father. Based upon this report, a child protective services caseworker and a deputy sheriff interviewed the girl at her public school without first obtaining a warrant or parental consent. Splitting with the Fifth Circuit, which had held under similar circumstances that the traditional warrant/warrant exception analysis sets too high a threshold when investigating allegations of child abuse, the Ninth Circuit held the interview violated the girl's Fourth Amendment right to be free from "unreasonable" seizures absent a warrant, court order, exigent circumstances, or parental consent. In so holding, the Ninth Circuit rejected the balancing-of-interests approach first established in *Terry v. Ohio* to assess whether detentions not amounting to an arrest are reasonable under the Fourth Amendment. It concluded instead that the Fourth Amendment demanded the application of the more restrictive standard of a warrant or an exception to the warrant requirement to interviews of this type.

I. Does the Fourth Amendment require a warrant, a court order, parental consent, or exigent circumstances before law enforcement and child welfare officials may conduct a temporary seizure and interview at a public school of a child whom they reasonably suspect was being sexually abused by her father?

PARTIES TO THE PROCEEDING

Petitioner is Deschutes County Deputy Sheriff James Alford. Other interested parties include the State of Oregon Department of Human Services representing Bob Camreta, the DHS caseworker, who has filed a separate Petition for Writ of Certiorari. The Bend LaPine School District and Terry Friesen, a school district employee, were defendants in the United States District Court, who prevailed at the U.S. Court of Appeals, Ninth Circuit, and are not appealing. Respondent is Sarah Greene who brought the lawsuit on her own behalf and on behalf of her minor children.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	2
A. Proceedings Below	2
B. Statement of Facts	5
ARGUMENT IN SUPPORT OF GRANTING THE WRIT	11
A. The Ninth Circuit's Holding That The *Terry/T.L.O.* "Reasonableness" Standard Did Not Apply To An In-School Interview Of A Student At A Public School Decided An Important Federal Question That Should Be Settled By This Court	11
B. The Ninth Circuit's Holding Conflicts With This Court's Holding In *Illinois v. Lidster*	19
C. The Ninth Circuit's Holding Is In Conflict With Several Other Circuits Concerning Whether The *Terry/T.L.O.* "Reasonableness" Standard Applies To An In-School Interview Of A Student At A Public School	23
D. *New Jersey v. T.L.O.* Provides The Appropriate Framework For Applying The *Terry* "Balancing" Test To Child Interviews In Public Schools	29
CONCLUSION	32

TABLE OF CONTENTS – Continued

Page

APPENDIX INDEX

Opinion
U.S. Court of Appeals for the Ninth Circuit
Filed December 10, 2009 ..... App. 1

Opinion and Order
U.S. District Court of the District of Oregon
United States District Judge Ann Aiken
Dated March 23, 2006..... App. 56

Order Denying Petition for Rehearing *En Banc*
U.S. Court of Appeals for the Ninth Circuit
Filed March 1, 2010 ..... App. 78

TABLE OF AUTHORITIES

Page

CASES

al-Kidd v. Ashcroft, 580 F.3d 949 (9th Cir. 2009) 22

B.C. v. Plumas Unified School Dist., 192 F.3d 1260 (9th Cir. 1999) 17

Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979) 16

Calabretta v. Floyd, 189 F.3d 808 (9th Cir. 1999) 30, 31

Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct 1727, 18 L.Ed.2d 930 (1967) 5

Daryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986) 23

Doe v. Bagan, 41 F.3d 571 (10th Cir. 1994) 3, 4, 23

Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979) 15, 16

Ferguson v. City of Charleston, 532 U.S. 67, 121 S.Ct. 1281, 149 L.Ed.2d 205 (2001) 5, 21, 22

Gates v. Texas Dept. of Protective and Regulatory Services, 537 F.3d 404 (5th Cir. 2008) ... *passim*

Greene v. Camreta, No. 05-6047-AA, 2006 WL 758547 (D. Or. March 23, 2006) 1

Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009) ..... *passim*

Illinois v. Lidster, 540 U.S. 419, 124 S.Ct. 885, 157 L.Ed.2d 883 (2004) 19, 20, 21, 22, 23

TABLE OF AUTHORITIES – Continued

Page

Indianapolis v. Edmond, 531 U.S. 32, 121 S.Ct. 447, 148 L.Ed.2d 333 (2000) 19

Kazery v. State, 995 So.2d 827 (Miss. App. 2008) 13

New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985) ..... *passim*

New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1983) 18

State v. Storch, 612 N.E.2d 305 (Ohio 1993) 12

Tenenbaum v. Williams, 193 F.3d 581 (2d Cir. 1999) 24

Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) ..... *passim*

U.S. v. Butterfly, 182 F.3d 928 (9th Cir. 1999) 12

U.S. v. George, 960 F.2d 97 (9th Cir. 1992) 12

U.S. v. Kincade, 379 F.3d 813 (9th Cir. 2004) 21

U.S. v. Place, 462 U.S. 696, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983) 25

U.S. v. Provost, 969 F.2d 617 (8th Cir. 1992) 12

U.S. v. U.S. District Court, 407 U.S. 297, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972) 30

Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995) 17, 18, 26, 30

TABLE OF AUTHORITIES – Continued

Page

Wildauer v. Frederick County, 993 F.2d 369 (4th Cir. 1993) 23

Wyman v. James, 400 U.S. 309, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971) 18

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 1

42 U.S.C. § 1983 ..... 1, 2

Ala. Code § 15-1-2(a) 14

Cal. Penal Code § 11166.3, subd. (a) 14

Cal. Penal Code § 13517 14

Conn. Gen. Stat. Ann. 17A-101H 14

Fla. Stat. Ann. Ch. 914.16 14

Haw. Rev. Stat. Ann. § 588-1 14

N.D. Cent. Code § 12.1-35-04 14

N.H. Rev. Stat. Ann. § 169-C:38(II) 14

Or. Rev. Stat. § 163.427(1)(a) 6

Or. Rev. Stat. § 418.747 12

Or. Rev. Stat. § 418.783 12

Or. Rev. Stat. § 418.784 12

Or. Rev. Stat. § 419B.020(1)(a) 8

Or. Rev. Stat. § 419B.045 8

Utah Code Ann. § 77-37-4 14

TABLE OF AUTHORITIES – Continued

Page

W. Va. Code § 61-8B-14 14

W. Va. Code § 61-8C-5 14

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV ..... *passim*

RULES

Or. Admin. R. 413-015-0415(5)(G)(iv) 8, 13

Or. Admin. R. 413-015-0420(1)(G) 8

Or. Admin. R. 413-015-0610 7

MISCELLANEOUS

U.S. Department of Health & Human Services, Administration for Children and Families (2007), at http://www.acf.hhs.gov/programs/cb/pubs/cm07/chapter5.htm 11

NDAA's AMERICAN PROSECUTORS RESEARCH INSTITUTE, MULTIDISCIPLINARY/MULTI-AGENCY CHILD PROTECTION TEAM STATUTES, http://www.ndaa.org/pdf/ncpaca-statute-multidisciplinary_nov_08.pdf 12

John E.B. Myers, *The Legal Response to Child Abuse: In the Best Interest of the Children?*, 24 J. Fam. L. 149, 182-84 (1985) 13

PETITION FOR A WRIT OF CERTIORARI

Petitioner Deschutes County Deputy Sheriff James Alford respectfully petitions for a writ of certiorari to issue in order to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") is published at 588 F.3d 1011 (9th Cir. 2009). The Opinion and Order of the United States District Court for the District of Oregon ("District Court") is reported at 2006 WL 758547.

JURISDICTION

The judgment of the Ninth Circuit was entered on December 10, 2009. Petitioner received an extension of time to file a Petition for Rehearing/Rehearing En Banc on December 22, 2009. The Ninth Circuit denied petitioner's timely Petition Rehearing/Rehearing En Banc on March 1, 2010.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). District Court jurisdiction was invoked pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1983.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit or equity, or other proper proceeding for redress,. . . .

STATEMENT OF THE CASE

A. Proceedings Below

S.G., a minor, nine years old at the time of the underlying events, sued in District Court alleging

that Defendants caseworker Bob Camreta ("Camreta") and Deputy Sheriff James Alford ("Alford") had unreasonably seized her at a public school in violation of the Fourth Amendment. S.G.'s claim arose from a two-hour interview conducted by Camreta and Alford in a school conference room. The interview took place after Camreta had received credible information suggesting S.G.'s father had sexually abused her and her five-year old sister. The District Court granted Camreta and Alford summary judgment on this claim, ruling that although S.G. had been seized for purposes of the Fourth Amendment, no constitutional violation had occurred because the seizure was reasonable under the circumstances.[1]

The District Court found the Tenth Circuit's analysis in *Doe v. Bagan*, 41 F.3d 571 (10th Cir. 1994) dispositive. *Bagan* considered whether the seizure of a nine-year old boy by a social services caseworker at a public school to interview him about his suspected sexual abuse of another child violated the Fourth Amendment. *Id.* at 573-74. Applying the reasonableness test of *Terry v. Ohio*, 392 U.S. 1 (1968), as incorporated in *New Jersey v. T.L.O.*, 469 U.S. 325

---

[1] Whether S.G. was seized in these circumstances is not at issue in this petition. However, as case law from several of the circuits have made clear, not all interviews of suspected child abuse victims in public schools by law enforcement or child protective workers amount to seizures under the Fourth Amendment.

(1985),[2] *Bagan* held no constitutional violation had occurred. *Id.* at 574 n. 3. It reasoned the seizure "was justified at its inception because a victim of child abuse had identified [the boy] as her abuser," and "a ten-minute interview with a social services caseworker was reasonably related in scope to determining [the boy]'s role in the incident." *Id.*

Applying the *Terry/T.L.O.* analysis to the facts of the present case, the District Court concluded the seizure of S.G. was reasonable at its inception, in that it was supported by a reasonable suspicion that she had been sexually abused by her father, and was reasonable in scope, in that the circumstances justified the interview's length. The District Court ruled alternatively that, even if the seizure was unconstitutional, qualified immunity protected Camreta and Alford from liability.

On appeal, the Ninth Circuit rejected the District Court's conclusion as to the Fourth Amendment violation, but agreed with its qualified immunity ruling. Accordingly, the Ninth Circuit affirmed the District Court as to its grant of summary judgment to Alford and Camreta, but reversed the District Court's summary judgment ruling as to the Fourth Amendment violation. This petition is concerned solely with

---

[2] In *T.L.O.*, this Court held that a school official's warrantless, in-school search of a student's purse, based on a reasonable suspicion that it contained evidence of a violation of the law or a school rule, did not violate the Fourth Amendment. 469 U.S. at 340-41.

the Ninth Circuit's substantive Fourth Amendment analysis, and qualified immunity is not at issue here.

The Ninth Circuit's holding relied on this Court's decision in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), and concluded the *Terry/T.L.O.* "balancing" test does not apply to in-school seizures conducted with law enforcement involvement.[3] *See Greene v. Camreta*, 588 F.3d 1011, 1026-30 (9th Cir. 2009). The panel reasoned that *Ferguson* barred the application of the *Terry/T.L.O.* standard where "law enforcement personnel or purposes" are too deeply involved in a seizure. *Id.* at 1027. Thus, it held "the general law of search warrants applies to child abuse investigations" where law enforcement is involved and, absent a warrant or court order, exigent circumstances, or parental consent, S.G.'s interview was unconstitutional. *Id.* at 1030.

B. Statement of Facts

Nimrod Greene ("Nimrod") was arrested on February 12, 2003, for the suspected sexual abuse of

---

[3] The "special needs" doctrine, first coined by Justice Blackmun in his concurring opinion in *T.L.O.*, *see* 469 U.S. at 351 (Blackmun, J., concurring), refers to the analysis used by this Court in a long line of cases, beginning with *Camara v. Municipal Court*, 387 U.S. 523 (1967), in which this Court has relaxed the traditional Fourth Amendment requirements of probable cause and a warrant where "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." The Ninth Circuit summarizes this Court's "special needs" cases in its opinion. *See, Greene*, at 1026, n. 10.

F.S., a seven-year old boy. F.S. was the son of Nimrod's employer. Nimrod and his wife Sarah were acquaintances of F.S.' parents, and had often socialized together. Nimrod's arrest was based on statements made by F.S. to his parents and later to investigators in which he alleged Nimrod had sexually assaulted him on two occasions. The second alleged assault occurred in F.S' home while Nimrod was visiting, after F.S.' parents had left him alone with Nimrod. Based on these allegations, Nimrod was arrested, charged with two counts of Sexual Abuse I, and lodged in the Deschutes County Adult Jail.[4]

During the investigation, F.S.' mother informed investigators she believed Nimrod was also sexually abusing his two daughters, S.G. and K.G., who were nine and five years old, respectively, at the time. She explained that Sarah, Nimrod's wife, had "talked to her about how she doesn't like the way Nimrod makes [S.G. and K.G.] sleep in his bed when he is intoxicated and she doesn't like the way he acts when they are sitting on his lap." F.S.' father also told officers that "Nimrod himself has made some type of prior comment about how his wife Sarah was accusing him of molesting his daughters and Sarah reportedly doesn't like the girls laying in bed with Nimrod when he has been drinking."

---

[4] "A person commits the crime of sexual abuse in the first degree when that person subjects another person to sexual contact . . . and the victim is less than 14 years of age." Or. Rev. Stat. § 163.427(1)(a).

On February 20, 2003, while Nimrod remained incarcerated, the Oregon Department of Human Services ("DHS"), the Oregon agency responsible for investigating allegations of child abuse and implementing protection plans for abused children, learned of the allegations against Nimrod by F.S' parents. DHS assigned Camreta to assess the safety of S.G. and K.G.

On Friday, February 21, 2003, Camreta learned Nimrod had been released on bail and was home having unsupervised contact with his young daughters. Based on his experience and training, Camreta knew child sex offenders often act on impulse and often direct those impulses against their own children. Hence, Camreta became concerned for the safety of S.G. and K.G.

On Monday, February 24, 2003, Camreta commenced an initial assessment as to whether S.G. and/or K.G. had been sexually abused. He knew where S.G. attended school and he knew it was in session. Believing the school was an appropriate environment to help make S.G. feel safe, and in order to conduct the interview away from the potential influence of her parents or other distractions, Camreta decided to interview S.G. that day.[5] He did not contact S.G.'s parents before conducting the interview.[6]

---

[5] Oregon law expressly permits DHS workers to interview a child at school "when the worker believes it will be the best environment in which to make contact with the child." Or. Admin. R. 413-015-0610.

[6] While a school administrator must be notified of such an interview, Oregon law does not always require notice to the

(Continued on following page)

Before going to the school, Camreta requested the assistance of the Deschutes County Sheriff. Oregon law encourages coordination between child protection workers and law enforcement officials when interviewing alleged child abuse victims in order to minimize the number of interactions among alleged victims, child protective services, and law enforcement.[7] Deputy Alford was dispatched to meet Camreta at the school to assist with S.G.'s interview.[8]

Upon arrival, Alford and Camreta met with a school counselor and asked to interview S.G. privately. The counselor consented, removed S.G. from her classroom, and escorted her to meet with Camreta and Alford in a large conference room adjacent to the school's administrative offices. She introduced the two men to S.G. and left. At the time of the interview, Alford was in his uniform, displaying his badge and a visible, holstered firearm.

Once in the room, S.G. sat down at a table with Camreta, who conducted the interview. The interview

---

child's parents. *See* Or. Rev. Stat. § 419B.045 (requiring notice to the school administrator, but not requiring any notice to a child's parents) and Or. Admin. R. 413-015-0420(1)(G) (requiring the DHS worker to conduct the interview outside the presence of the parents where a parent is the alleged perpetrator).

[7] *See* Or. Admin. R. 413-015-0415(5)(G)(iv).

[8] "Upon receipt of an oral report of child abuse, the Department of Human Services or the law enforcement agency shall immediately . . . cause an investigation to be made to determine the nature and cause of the abuse of the child." Or. Rev. Stat. § 419B.020(1)(a).

lasted no more than two hours.[9] Before discussing the allegations against her father, Camreta attempted to establish a rapport with S.G., and spoke with her on subjects such as school, where she had lived during her life, her cats and her homework. Eventually, S.G. began to open up to Camreta about her father's alleged abuse, and after some time provided him with the following information:

> "When he drinks he tries to do it," meaning "he tries to touch me somewhere in my private parts. Then I go to my room and lock the door."
>
> The last incident occurred "just last week" on the outside of her clothing and she had tried to tell him to stop.
>
> Nimrod stopped the private part touching "yesterday because he isn't going to drink anymore."
>
> The touching of private parts started when she was three.
>
> The touching involved the chest and buttock areas, outside of her clothing. Her father sometimes "mumbled during the touching."

---

[9] The parties dispute the length of the interview. According to Camreta and Alford, the interview lasted only 45 to 60 minutes. S.G. claimed the interview lasted closer to two hours. Because this issue arose at summary judgment, the Ninth Circuit viewed the facts in the light most-favorable to the non-moving party and assumed the interview lasted two hours.

> S.G.'s mother knew about the touching. Her mother had said within the last couple of days that "she had to deal with my dad," and the touching was "one of our secrets," with her little sister, K.G.

S.G.'s statements, coupled with the reports of F.S. and his parents, led Camreta to believe S.G. had been sexually abused by Nimrod.

While Camreta conducted the interview, Alford did not ask S.G. any questions. According to S.G., Alford "just sat there," and never participated in the interview. She indicated she believed she could trust Alford and that he did nothing to make her feel differently. Neither Camreta nor Alford ever touched or threatened S.G. S.G. acknowledged Alford was always nice to her at the interview, that she trusted him, and that he never did anything to frighten her. She also acknowledged it was common for police officers to be present at school, and she was comfortable in their presence.

When Camreta completed the interview, he contacted the counselor. It was near the end of the school day, and he and Alford wanted to make certain S.G. would catch her bus to return home. The counselor retrieved S.G. and they left.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

A. The Ninth Circuit's Holding That The *Terry/T.L.O.* "Reasonableness" Standard Did Not Apply To An In-School Interview Of A Student At A Public School Decided An Important Federal Question That Should Be Settled By This Court.

As the Ninth Circuit recognized, this case presents a Fourth Amendment question of exceptional importance. *See Greene, supra,* 588 F.3d at 1015-16, 21 ("[T]he constitutional standards governing the in-school seizure of a student who may have been abused by her parents are of great importance.") Child abuse unquestionably poses an immense problem throughout the states and, as observed by the Ninth Circuit, the number of child abuse investigations performed by state and local agencies is "staggering." *Id.* at 1015 (citing a U.S. Department of Health and Human Services report showing that, in 2007 alone, state and local agencies investigated 3.2 million reports of child abuse or neglect) (citations omitted).

This problem is compounded by the fact that nearly 80 percent of the perpetrators of child abuse are parents.[10] Because child sex abuse is a crime which occurs in secret against the defenseless, it is

---

[10] U.S. Department of Health & Human Services, Administration for Children and Families (2007), at http://www.acf.hhs.gov/programs/cb/pubs/cm07/chapter5.htm.

highly unlikely that proof of such horrific misconduct can be developed in most cases without access to the victim. In instances where the parent is the alleged abuser, voluntary parental consent to question the victim is also highly unlikely. Further, the fact that consent has been sought by investigators to speak with the alleged victim frequently provides a parent the opportunity to dissuade the child from answering questions or to otherwise influence the child before an interview can take place. Several courts have recognized that abused children will often recant as a result of familial pressures. *See, e.g., U.S. v. Butterfly,* 182 F.3d 928 (9th Cir. 1999); *U.S. v. George,* 960 F.2d 97, 101 (9th Cir. 1992); *U.S. v. Provost,* 969 F.2d 617, 621 (8th Cir. 1992). *See also, State v. Storch,* 612 N.E.2d 305, 315 (Ohio 1993) ("Child abuse victims, susceptible to parental influence, are likely to change testimony. . . .") For this reason, investigative interviews of suspected child abuse victims almost always occur before government officials are able to develop "probable cause" to believe the abuse has occurred

In Oregon, as in the majority of states,[11] child protective agencies and law enforcement personnel are required to coordinate their efforts and cooperate in child abuse investigations.[12] Thus, caseworkers

---

[11] *See, e.g.,* NDAA's AMERICAN PROSECUTORS RESEARCH INSTITUTE, MULTIDISCIPLINARY/MULTI-AGENCY CHILD PROTECTION TEAM STATUTES, http://www.ndaa.org/pdf/ncpaca-statute-multidisciplinary_nov_08.pdf

[12] *See, e.g.,* Or. Rev. Stat. §§ 418.747, 418.783, and 418.784.

from DHS work closely with local law enforcement agencies in a multidisciplinary approach to investigate suspected child abuse. This approach encourages law enforcement officers and DHS caseworkers, whenever possible, to jointly attend investigative interviews of suspected child abuse victims such as S.G.'s interview in this case.[13] The primary reason for this agency coordination between agencies in the context of child interviews is to minimize the trauma caused by subjecting a child to multiple interview sessions concerning alleged abuse. Repeated questioning of abused children has been described by several courts and commentators as a "second victimization," where the suspected victim is subjected to multiple interviews requiring repeated descriptions of the abuse.[14] In a recent case, Dr. Catherine Dixon, the Clinical Director of the Mississippi Children's Advocacy Center in Jackson explained "by coordinating the multiagency response to child abuse, and by designating a forensic interviewer, children are spared the additional stress and better information is obtained, inevitably leading to better decision-making. And better decision-making positively impacts child protection and prosecution outcomes." *Kazery v. State*, 995 So.2d

---

[13] Or. Admin. R. 413-015-0415(5)(G)(iv) ("When the CPS worker and the [law enforcement officer] must each interview a child, it is preferable to coordinate the interviews to reduce the number of interactions with the child.").

[14] John E.B. Myers, *The Legal Response to Child Abuse: In the Best Interest of the Children?*, 24 J. Fam. L. 149, 182-84 (1985).

827 (Miss. App. 2008). Numerous states other than Oregon explicitly recognize the need for such coordination when interviewing children in these investigations.[15]

Here, the Ninth Circuit held that a DHS caseworker and a deputy sheriff violated the Fourth Amendment when, without a warrant, court order, exigent circumstances, or parental consent, they jointly interviewed a nine-year old girl at her public school concerning suspected sexual abuse by her father. This decision essentially invalidates what had been a routine investigative technique used by law enforcement and child protection agencies not only in

---

[15] *See, e.g.*, Alabama, Ala. Code § 15-1-2(a) [reasonable limits on the number of interviews a victim of sexual abuse must submit to]; California, Cal. Penal Code §§ 11166.3, subd. (a) [requirement of coordination among agencies in child abuse investigations] and 13517 [procedures to minimize the number of interviews of children]; Connecticut, Conn. Gen. Stat. Ann. 17A-101H [requiring coordination of investigatory activities to limit number of interviews]; Florida, Fla. Stat. Ann. Ch. 914.16 [reasonable limits on number of interviews of children]; Hawaii, Haw. Rev. Stat. Ann. § 588-1 [reduce the number of interviews of child abuse victims so as to minimize re-victimization of the child]; New Hampshire, N.H. Rev. Stat. Ann. § 169 C:38(II) [law enforcement and child protection agency shall cooperate in limiting the number of interviews of a child victim]; North Dakota, N.D. Cent. Code § 12.1-35-04 [protecting the victims from repeated or lengthy interviews]; Utah, Utah Code Ann. § 77-37-4 [child interviews kept to a minimum]; West Virginia, W. Va. Code §§ 61-8B-14 and 61-8C-5 [limits on interviews of children in child abuse matters].

Oregon but also in a myriad of states across the country.

This background makes clear that the Ninth Circuit's decision implicates a Fourth Amendment question of great significance which justifies review by, and guidance from, this Court: Do interviews performed at a public school as part of a joint investigation by social services and law enforcement officials require probable cause, a court order, exigent circumstances or parental consent before the interview, or may these officials employ the more flexible "balancing" approach of *Terry v. Ohio* to determine whether an interview is warranted?

As this Court is aware, historically, "the Fourth Amendment's guarantee against unreasonable seizures of persons was analyzed in terms of arrest, probable cause for arrest, and warrants based on such probable cause." *Dunaway v. New York*, 442 U.S. 200, 208-09 (1979). "The term 'arrest' was synonymous with those seizures governed by the Fourth Amendment." *Id.* at 209. Under this "traditional" approach, the probable cause and warrant requirements applied to all Fourth Amendment seizures of persons, "without the need to 'balance' the interests and circumstances involved in particular situations." *Id.*

Terry v. Ohio abandoned this all-inclusive view of "seizures." The *Terry* Court recognized police conduct that is less intrusive than an arrest, such as the "stop and frisk" methods used by police that were at issue,

should "be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." *Id.* at 20. As explained in *Dunaway,* "to determine the justification necessary to make this specially limited intrusion 'reasonable' under the Fourth Amendment, the Court balanced the limited violation of individual privacy involved against the opposing interests in crime prevention and detection and in the police officer's safety." *Dunaway,* 442 U.S., at 209 (citing *Terry,* at 22-27). The result of that balancing approach, of course, was the now well-known "reasonable suspicion" standard of *Terry.*[16]

Since *Terry,* this Court has consistently recognized that "reasonableness," not the traditional requirements of a warrant and probable cause, forms the touchstone of the Fourth Amendment. *See, e.g.,*

[16] Since *Terry,* where the "balancing test" was first enunciated by the Court, it has been stated in more generalized terms to enable its application in a variety of contexts. Thus, in order to determine whether a search or seizure is reasonable under the Fourth Amendment, the Court will balance "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown v. Texas,* 443 U.S. 47, 51 (1979). This balancing is part of the overall reasonableness inquiry, which "is a dual one – whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry,* 393 U.S. at 20.

New Jersey v. T.L.O., supra, 469 U.S. 325, 337-42.[17] Thus, not all seizures must be supported by a warrant or a recognized exception to the warrant requirement. This Court has repeatedly observed that legitimate reasons dictate that some encounters between a government official and a citizen involving a law enforcement purpose do not require probable cause and a warrant before they can take place.

S.G.'s interview in this case was such an encounter. Any intrusion into her interests resulting from the interview was relatively minimal. Precedent dictates that students' freedoms of movement and privacy are limited in the public school context. *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 655-56 (1995) (citing *T.L.O., supra,* at 336, 339). While schoolchildren do not shed their constitutional rights upon entering a school, "Fourth Amendment rights . . . are different in public schools than elsewhere." *Id.* Inquiries into the constitutionality of in-school searches and seizures "cannot disregard the schools' custodial and tutelary responsibility for the children." *Id.* at 656. A student's privacy interests are limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. *Id.* Thus, "[a] degree of supervision and control that could not be exercised over free adults" is permitted in the public school context. *B.C. v. Plumas*

[17] *T.L.O.* expressly adopted the *Terry* balancing approach in the context of the search of a student at a public school. 469 U.S. 325, 341-42.

Unified School Dist., 192 F.3d 1260, 1269 (9th Cir. 1999) (quoting *Vernonia*, 515 U.S. at 655-56).

At the same time, the responsible governments possess an extraordinary interest in promptly and effectively investigating allegations of sexual abuse. *See, e.g., New York v. Ferber*, 458 U.S. 747, 756-57 (1983) (the government's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling"); *Wyman v. James*, 400 U.S. 309, 318 (1971) (the needs of a child are "paramount" and "[t]here is no more worthy object of public concern.")

This Court has yet to address the application of the *Terry/T.L.O.* balancing approach in the context of child abuse investigations. As the Ninth Circuit panel in this matter recognized, while the question has been addressed by several circuits in analogous situations, they are divided on whether the *Terry/T.L.O.* "balancing" approach is appropriate in this context. *Greene*, 588 F.3d at 1026, n. 11. Certainly, there exists precious little clear guidance on the type of interview involved herein – where a suspected *victim* of parental child abuse was interviewed at a public school.[18] Since many states employ similar coordinated interviews in suspected child abuse cases, and since these interviews are substantial and highly effective

[18] As discussed in Section C, only one case at the circuit level – *Gates v. Texas Dept. of Protective and Regulatory Services*, 537 F.3d 404 (5th Cir. 2008) – addresses the issue in this specific context. The Ninth Circuit decision below is clearly at odds with *Gates*.

tools for protecting children from abuse, it is critical for law enforcement and child protective agencies to receive clear guidance concerning the legality of such interviews in relation to the Fourth Amendment. This case presents the Court with an appropriate vehicle to provide necessary guidance to those government officials charged with protecting our children.

B. The Ninth Circuit's Holding Conflicts With This Court's Holding In *Illinois v. Lidster*.

Review of this case is warranted because the Ninth Circuit's opinion conflicts with *Illinois v. Lidster*, 540 U.S. 419 (2004). In *Lidster*, the *Terry* "balancing" test was employed to examine a brief, suspicionless detention of motorists at a police checkpoint which was utilized to determine if any of the motorists had witnessed a recent hit-and-run accident in the area. *Id.* at 421-22. The *Lidster* Court distinguished the checkpoint involved in that case from the police checkpoint involved in its earlier decision in *Indianapolis v. Edmond*, 531 U.S. 32 (2000). The Court found it highly significant that the checkpoint in *Edmond* was specifically intended to determine whether the motorists stopped at the checkpoint were themselves perpetrating a crime, whereas the checkpoint involved in *Lidster* was intended only to determine whether those stopped at the checkpoint had information regarding a crime likely committed by someone else:

> The checkpoint stop here differs significantly from that in *Edmond*. The stop's primary law

> enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others. The police expected the information elicited to help them apprehend not the vehicle's occupants, but other individuals.

Id. at 423 (emphasis in original).

The *Terry* "balancing" test was then applied by the *Lidster* Court to determine the reasonableness of the checkpoint at issue. The Court first observed that a motorist in a car has reduced interests in privacy and liberty when driving on a public road, observing that "[t]he Fourth Amendment does not treat a motorist's car as his castle." *Id.* at 424. It then found that the competing government interest was compelling: "The relevant public concern was grave. Police were investigating a crime that had resulted in a human death. No one denies the police's need to obtain more information at that time. And the stop's objective was to help find a the perpetrator of a specific and known crime, not of unknown crimes of a general sort." *Id.* at 427. Finally, the Court ruled the intrusion into the individual interests of the motorists involved was minimal: "Most importantly, the stops interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect," given that each stop was brief and "provided little reason for anxiety or alarm." *Id.* at 427-28. Balancing those

factors, as required by *Terry*, the Court held the suspicionless seizure of motorists at the checkpoint was constitutional. *Id.* at 428.

In its decision, the Ninth Circuit relied on this Court's holding in *Ferguson v. City of Charleston, supra,* to reject the application of the *Terry/T.L.O.* "balancing" test to S.G.'s interview. However, nothing in *Ferguson* precludes applying *Terry* "balancing" to this case. The *Ferguson* Court held that the *Terry/T.L.O.* test, as it had been applied in its "special needs" cases, is not applicable to searches where a law enforcement purpose is involved. 532 U.S. at 78. Because *T.L.O.* was one of the "special needs" cases discussed in *Ferguson,* the Ninth Circuit took this to mean the *Terry/T.L.O.* analysis is precluded whenever a government seizure involves a law enforcement purpose. *Greene,* 588 F.3d at 1026-27. Thus, based on Alford's presence at S.G.'s interview, the Ninth Circuit concluded a *Terry/T.L.O.*-based analysis in this case was not permitted. *Id.* at 1030.

The Ninth Circuit's holding in this case clearly conflicts with *Lidster.* While *Lidster* has been referred to as a "special needs" case,[19] it is clearly distinguishable from those "special needs" cases the *Ferguson* Court held to be inapplicable in situations where a law enforcement purpose is present. In this sense, *Lidster* can be viewed either as providing an

---

[19] *See U.S. v. Kincade,* 379 F.3d 813, 823 (9th Cir. 2004) (referring to *Lidster* as a "special needs" case)

exception to *Ferguson's* general rule that the "special needs" doctrine does not apply to governmental action having a law enforcement purpose, or it simply can be viewed as a recognition by this Court that in some circumstances intrusive government conduct such as a seizure does not result in an invasion of the privacy and/or liberty interests of a citizen that is so severe as to require probable cause and a warrant.[20] Viewed either way, *Lidster* clearly provides that, where a person seized is a potential witness to a crime as opposed to a person suspected of a crime, the requirement for a warrant or one of the exceptions to the warrant requirement are not necessary before the seizure is performed. Rather, the *Terry/T.L.O.* "balancing" test should be used to measure the "reasonableness" of the seizure under the Fourth Amendment.

The *Terry/T.L.O.* "balancing" approach should have been applied by the Ninth Circuit in the underlying appeal. Just as the motorists in *Lidster* were potential witnesses to a crime, not suspects, S.G. was seized not because she was suspected of a crime, but

---

[20] The distinction between the seizure upheld as "reasonable" in *Lidster* and the conduct *Ferguson* held to be subject to traditional warrant and probable cause requirements was, in fact, acknowledged by the Ninth Circuit in *al-Kidd v. Ashcroft*, 580 F.3d 949, 969 (9th Cir. 2009) (acknowledging the distinction made in *Lidster* between "special needs" cases involving seizures designed to determine whether a person has committed a crime and seizures designed to elicit information about the suspected crime of another).

rather because she was a potential witness to the alleged crimes of her father. To be consistent with *Lidster,* the Ninth Circuit should have analyzed S.G.'s seizure using the balancing approach of *Terry.* Accordingly, the Court should grant this petition and review the Ninth Circuit's rejection of the *Terry/T.L.O.* "balancing" approach and its application of the warrant/probable cause standard to these different but all too common circumstances.

C. The Ninth Circuit's Holding Is In Conflict With Several Other Circuits Concerning Whether The *Terry/T.L.O.* "Reasonableness" Standard Applies To An In-School Interview Of A Student At A Public School.

The Ninth Circuit recognized the federal courts are split on the applicability of the *Terry/T.L.O.* analysis to investigations of child abuse. *Greene,* 588 F.3d at 1026, n. 11. It acknowledged several circuits have adopted the *Terry/T.L.O.* analysis to measure the seizures of children in the context of similar investigations. *Id.* (citing *Doe v. Bagan, supra,* 41 F.3d 571, 575 n. 3 (10th Cir. 1994) (applying *T.L.O.'s* lower standard of "reasonableness" to the seizure of a student at school during a child sexual abuse investigation); *Wildauer v. Frederick County,* 993 F.2d 369, 372-73 (4th Cir. 1993) (applying *T.L.O.* "reasonableness" analysis to seizure of children from foster home in child neglect investigations); and *Daryl H. v. Coler,* 801 F.2d 893, 900-02 (7th Cir. 1986) (applying the *T.L.O.* standard of "reasonableness" to a seizure and strip search of a suspected child abuse victim and

holding the warrant and probable cause requirements inapplicable).[21]

While these holdings indeed differ from the Ninth Circuit's conclusion as to the application of the *Terry/T.L.O.* analysis, the panel decision creates an additional and more factually specific split with the Fifth Circuit holding in *Gates v. Texas Dept. of Protective and Regulatory Services, supra,* 537 F.3d 404 (5th Cir. 2008).

In *Gates*, State officials removed children from a public school on two separate occasions and took them to a separate location for a videotaped interview during an investigation of alleged parental abuse. *Id.* The interview took place at the Child Advocacy Center ("CAC"), which had been established as a place to bring suspected child abuse victims specifically for the purpose of questioning them concerning

---

[21] The panel listed *Tenenbaum v. Williams,* 193 F.3d 581, 604 (2d Cir. 1999), as one holding rejecting the application of the *Terry/T.L.O.* "balancing" approach in favor of the traditional warrant/probable cause approach in the course of child abuse investigations. While an exigent circumstances analysis was ultimately employed by the Court in analyzing the removal of a child from school to conduct a physical examination for evidence of sexual abuse, the Court acknowledged without elaboration that an exigent circumstances analysis might not always be appropriate, stating "[W]e refrain from deciding categorically, as did the district court, that the removal of a child of whom abuse is suspected is not a "special needs" situation. There may be circumstances in which the law of warrant and probable cause established in the criminal setting does not work effectively in the child removal or child examination context."

allegations of abuse. *Id.* The goal of the CAC was "to coordinate child abuse investigations among the various branches of government, including the Texas Department of Protective and Regulatory Services, county law enforcement, and the district attorney so that children will not experience the trauma of multiple investigations from the different governmental entities." *Id.* Through the use of this facility, "a CAC worker may conduct one interview of a child that can then be used by any branch of government, rather than each entity conducting its own interview." *Id.* Thus, these children, unlike S.G., were removed from their school and driven to an unfamiliar location for a videotaped interview conducted, in part, for a law enforcement purpose.

The *Gates* plaintiffs argued the Court should employ the traditional probable cause/exigent circumstances approach to analyze these seizures. *Id.* at 432. The Fifth Circuit declined to do so, rejecting this approach in favor of the more lenient *Terry* "balancing" test. *Id.* at 431-34 ("In assessing the reasonableness of a seizure, we are to balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests that justify the intrusion.") (citing *U.S. v. Place,* 462 U.S. 696, 703 (1983) (discussing the application of the *Terry* "balancing" test)). In its analysis, the Fifth Circuit acknowledged the vast difference between a seizure of a child from home and a seizure from a public school, where a child's liberty and privacy interests are limited:

> The Gates would have us adopt an exigent circumstances standard similar to the one employed when children are seized from their homes for the purposes of taking them into state custody. Such a blanket rule, however, fails to account for the differences in the nature and quality of the intrusion. Temporarily seizing a child from a public school in order to interview him in a safe place is decidedly different than seizing a child from his home for the purpose of removing him from allegedly abusive parents.
>
> To begin with, the rights of children to freely move about, especially within a public school, are not as extensive as adults' rights. The Supreme Court has recognized that Fourth Amendment rights of children "are different in public schools than elsewhere; the 'reasonableness inquiry cannot disregard the schools' custodial and tutelary responsibilities for children.'" Thus, while the Fourth Amendment is not non-existent, students have a lesser expectation of privacy. Further, unemancipated minors lack the right to come and go at will, remaining subject to the control of their guardians or parents. Consequently, seizing a child from a public school is a lesser intrusion into the freedoms the child would otherwise enjoy, as those freedoms have already been limited.

Id. at 432 (citing *Vernonia School Dist., supra,* 515 U.S. at 654, 656-57).

The *Gates* Court next held the nature and scope of the seizure in this context was reasonable, given the circumstances:

> [T]he nature and scope of the intrusion into the child's right is relatively small. The seizures in this case were for the purpose of interviewing the children for their own protection. As described above, the CAC was created with the purpose of reducing trauma to the possible victims of child abuse by coordinating child abuse investigations among the various branches of government. Although claiming that a seizure of a child is for his benefit will not automatically justify a seizure, it is a factor that should be taken into account.

Id. (citations omitted).

Based on this analysis, the Court adopted the *Terry/T.L.O.*[22] approach to analyze the seizure and removal of a child from a public school during a child abuse investigation:

> Given the differences in the freedoms enjoyed by children inside a public school, the nature and scope of the seizures at issue, and

---

[22] Although the Fifth Circuit did not expressly adopt the *T.L.O.* analysis in *Gates*, it cannot be ignored that the Court's recognition of the reduced protections of public school students within the framework of the *Terry* "balancing" analysis is extremely similar, if not identical, to the analysis used by this Court in *T.L.O.*

> the need to promptly investigate and act upon allegations of child abuse, we believe an exigent circumstances analysis sets too high a threshold for the state to overcome when investigating allegations of child abuse. However, removing a child from a public school solely on the basis of an anonymous report is not a constitutional solution either. The answer lies somewhere in between.
>
> . . . Just as "an anonymous tip, standing alone, is rarely sufficient to provide probable cause for a warrant," an anonymous tip regarding child abuse will rarely be sufficient to justify the seizure of a child. However, anonymous tips that have been independently corroborated by government officials may provide sufficient grounds to seize a child. Thus, before seizing a child on the basis of an anonymous tip, [defendant] must sufficiently corroborate the tip by initiating its own investigation. This might involve a preliminary interview of the child, his teachers, or peers, or perhaps a visual inspection of any injuries that can be seen without the removal of the child's clothing.

Id. at 433 (citation omitted).[23]

---

[23] Specifically, the *Gates* standard is that "before a social worker can remove a child from a public school for the purpose of interviewing him in a central location without a court order, the social worker must have a reasonable belief that the child has been abused and probably will suffer further abuse upon his return home at the end of the school day." *Gates*, 537 F.3d at 433.

A similar seizure occurred later at a YMCA, where, during a home/private school function, and unbeknownst to the caretaker who was supervising the children, sheriff's deputies took two of the Gates' children into a separate room to interview them about allegations of abuse. *Id.* at 434. The Fifth Circuit held that because this intrusion was minor and of short duration, it "was very similar to an investigatory detention, as approved in *Terry v. Ohio* [citation omitted] in that it was supported by reasonable suspicion and was no more intrusive than necessary. There is nothing to suggest the Fort Bend deputies stepped outside their constitutional bounds." *Id.* Therefore, the *Gates* Court expressly applied the *Terry* "balancing" approach to analyze the investigatory conduct of the sheriff's deputies.

The Ninth Circuit's holding, requiring a warrant, a court order, exigent circumstances or parental consent for the S.G. interview at her public school, conflicts sharply with the Fifth Circuit's holding in *Gates*. Again, and for this reason, review by the Supreme Court is justified.

D. *New Jersey v. T.L.O.* Provides The Appropriate Framework For Applying The *Terry* "Balancing" Test To Child Interviews In Public Schools.

As mentioned above, *New Jersey v. T.L.O.* considered the constitutionality of searches of students by school officials at a public school. 469 U.S. at 328.

The *T.L.O.* Court expressly applied *Terry's* balancing approach to determine whether the student searches at issue were reasonable under the Fourth Amendment. *Id. T.L.O.* emphasized that students at a public school have lesser expectations of privacy and liberty than members of the population generally. *Id.* at 340, 348 (Powell, J., concurring). Since *T.L.O.*, this Court has maintained that students in public schools cannot expect the same level of privacy and liberty as they might expect at home or elsewhere. *See, e.g., Vernonia School Dist., supra,* 515 U.S. at 655-56.

In *Gates*, the Fifth Circuit found the distinction between a child's Fourth Amendment rights at home and such rights at a public school to be significant. *Supra,* 537 F.3d at 432-34.[24] Based on this distinction, and applying the *Terry* "balancing" test to the in-school seizures of children involved in *Gates*, the Fifth Circuit held these seizures to be reasonable, despite the fact that a law enforcement purpose was involved. *Id.*

In its opinion, the Ninth Circuit relied, in large part, on its prior decision in *Calabretta v. Floyd,* 189 F.3d 808 (9th Cir. 1999) to conclude that *Terry* "balancing" was not appropriate in this case. *Greene,* 588 F.3d at 1022 ("*Calabretta* does not resolve the Fourth Amendment issue in this case but goes a fair

---

[24] "[P]hysical entry of the home is the chief evil against which the . . . Fourth Amendment is directed." *Gates,* 537 U.S. at 420 (quoting *U.S. v. U.S. District Court,* 407 U.S. 297, 313 (1972)).

way toward doing so.") However, *Calabretta* arose from a seizure of children at their *home* by a social worker and a police officer. *Id.* at 811. It did not involve a seizure at a public school. This distinction was barely touched on by the panel in this case, and it does not appear to have factored into the panel's decision, despite the fact that the Ninth Circuit had explicitly acknowledged this distinction in *Calabretta*. *Id.* at 816 ("[*T.L.O.*] has no bearing on searches of a home. . . . The [*T.L.O.*] [C]ourt emphasized that it was the 'school setting' that 'requires some easing of the restrictions to which searches by public authorities are ordinarily subject.'") (citing *T.L.O.*, 469 U.S. at 340.) Yet, unlike the Ninth Circuit's decision here, the *T.L.O.* Court held this distinction to be crucial in determining whether *Terry* "balancing" should be applied in the public school context.

Although the *T.L.O.* Court was considering "searches carried out by school authorities acting alone and on their own authority," 469 U.S. at 341 n. 1, nothing in its decision prohibits the application of *Terry's* balancing approach to seizures of students by non-school officials in a public school. *T.L.O.*'s central analysis, which recognized that students have limited privacy and liberty interests while at a public school and that competing governmental interests must be weighed against the interests of students when analyzing an in-school seizure, provides the appropriate framework for applying the *Terry* "balancing" test here. The *Terry* test, as incorporated in *T.L.O.*, should

have been applied in this case to balance S.G.'s reduced privacy and liberty interests at her school against the legitimate interests of Deputy Alford and Camreta in determining whether S.G. had been abused by her father. This, along with the previous reasons discussed in this Petition, justifies review of the Ninth Circuit's opinion by this Court.

CONCLUSION

For the for the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

CHRISTOPHER DENNIS BELL
Counsel of Record
Assistant Legal Counsel
STEVEN EDWARD GRIFFIN
Assistant Legal Counsel
OFFICE OF DESCHUTES COUNTY LEGAL COUNSEL
1300 NW Wall Street, Suite 205
Bend, OR 97701
541-388-6624
christopher_bell@co.deschutes.or.us
steven_griffin@co.deschutes.or.us

Attorneys for Petitioner
Deschutes County Deputy Sheriff James Alford

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Plaintiff-Appellant

v.

BOB CAMRETA; DESCHUTES COUNTY; JAMES ALFORD, Deschutes County Deputy Sheriff; BEND LAPINE SCHOOL DISTRICT; TERRY FRIESEN,

Defendants-Appellees

No. 06-35333

D.C. No.
CV-05-06047-AA

OPINION

Appeal from the United States District Court
for the District of Oregon
Ann L. Aiken, District Judge, Presiding

Argued and Submitted
March 6, 2008 – Portland, Oregon

Filed December 10, 2009

Before: Marsha S. Berzon and Carlos T. Bea, Circuit Judges, and Philip Gutierrez,* District Judge.

Opinion by Judge Berzon

---

* The Honorable Philip Gutierrez, United States District Court for the Central District of California, sitting by designation.

COUNSEL

Mikel R. Miller, Law Office of Mikel R. Miller, Bend, Oregon, for the plaintiff-appellant.

Hardy Myers, Attorney General; Mary H. Williams, Solicitor General; David B. Thompson, Senior Assistant Attorney General; for Bob Camreta, Defendant-Appellee. Janet M. Schroer, Hoffman, Hart & Wagner, LLP, for Terry Friesen and Bend LaPine School District, defendants-appellees. Christopher Bell and Mark P. Amberg, Deschutes County Legal Counsel, for Deputy Sheriff James Alford and Deschutes County, defendants-appellees.

OPINION

BERZON, Circuit Judge:

We are asked to decide whether the actions of a child protective services caseworker and deputy sheriff, understandably concerned for the well-being of two young girls, exceeded the bounds of the constitution. Specifically, the girls' mother, Sarah Greene, alleges, on behalf of S.G., one of her children, that the caseworker, Bob Camreta, and deputy sheriff, James Alford, violated the Fourth Amendment when they seized and interrogated S.G. in a private office at her school for two hours without a warrant, probable cause, or parental consent. Sarah also argues that Camreta's subsequent actions, both in securing a court order removing the girls from her custody and in subjecting the girls to intrusive sexual

abuse examinations outside her presence, violated the Greenes' familial rights under the Due Process Clause of the Fourteenth Amendment.

As this brief description makes clear, resolving the constitutional claims at issue in this case involves a delicate balancing of competing interests. On one hand, society has a compelling interest in protecting its most vulnerable members from abuse within their home. The number of child abuse allegations is staggering: In 2007, for example, state and local agencies investigated 3.2 million reports of child abuse or neglect. *See* U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES. CHILD MALTREATMENT 2007 (2009), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm07/chapter2.htm.

On the other hand, parents have an exceedingly strong interest in directing the upbringing of their children, as well as in protecting both themselves and their children from the embarrassment and social stigmatization attached to child abuse investigations. Of the millions of investigations conducted by state and local agencies in 2007, only about a quarter concluded that the children were indeed victims of abuse. *See id.* This discrepancy creates the risk that "in the name of saving children from the harm that their parents and guardians are thought to pose, states ultimately cause more harm to many more children than they ever help." Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic*

Costs of a Child Welfare Exception to the Fourth Amendment, 47 WM. & MARY L. REV. 413, 417 (2005).

With these competing considerations in mind, we turn first to Sarah's constitutional claims. As we explain below, we hold that the investigation conducted by Camreta and Alford and the removal and examination instigated by Camreta all violated Sarah and the girls' constitutional rights. As to the investigation, however, we conclude that Camreta and Alford cannot be liable in damages because they have qualified immunity.

I. FACTS & PROCEDURAL HISTORY

A. FACTUAL BACKGROUND

Nimrod Greene ("Nimrod") was arrested on February 12, 2003, for suspected sexual abuse of F.S., a seven-year old boy. Nimrod's arrest was based on statements made by F.S. to his parents and similar statements later made to investigators, all alleging that Nimrod had touched F.S.'s penis over his jeans when Nimrod was drunk in F.S.'s parents' home. F.S. reported that Nimrod had done this to him once before. In addition, F.S.'s mother told officers that Sarah, Nimrod's wife, "had talked to her about how she doesn't like the way Nimrod makes [their daughters, S.G. and K.G.,] sleep in his bed when he is intoxicated and she doesn't like the way he acts when they are sitting on his lap." Along the same lines, F.S.'s father told officers that:

> Nimrod himself has made some type of prior comment about how his wife Sarah was accusing him of molesting his daughters and Sarah reportedly doesn't like the girls laying in bed with Nimrod when he has been drinking. [F.S.'s father] said neither he nor his wife [ ] have any direct knowledge of abuse at the Greene home, but this type of comment and/or accusation has come in several ways from Sarah and Nimrod.

The Oregon Department of Human Services ("DHS") heard of these allegations about a week after Nimrod's arrest. The next day, Bob Camreta, a caseworker with DHS, learned that Nimrod had been released and was having unsupervised contact with his daughters. Camreta was assigned to assess the girls' safety. Based on his training and experience as a DHS caseworker, Camreta was "aware that child sex offenders often act on impulse and often direct those impulses against their own children, among others. For this reason, [he was] concerned about the safety and well-being of Nimrod Greene's own small children."

Three days after hearing of Nimrod's release, Camreta visited S.G.'s elementary school to interview her. Camreta thought the school would be a good place for the interview because it is a place where children feel safe and would allow him "to conduct the interview away from the potential influence of suspects, including parents." According to Camreta, "[i]nterviews of this nature, on school premises, are a regular part of [child protective services] practice and

are consistent with DHS rules and training." Sarah was not informed of, nor did she consent to, the interview of her daughter. Camreta also did not obtain a warrant or other court order before the interview.

Throughout the interview Camreta was accompanied by Deputy Sheriff Alford. Upon arriving at the school, Camreta told school officials that he and Alford were there to interview S.G. and requested use of a private office. Terry Friesen, a counselor at the elementary school, visited S.G. in her classroom and told the child that someone was there to talk with her. Friesen took S.G. to the room where Camreta and Alford were waiting and left.

Camreta interviewed S.G. for two hours in Alford's presence.[1] The interview was not recorded. Alford, who had a visible firearm, did not ask any questions during the interview. According to Camreta, S.G. told him:

- " 'When he drinks he tries to do it,' meaning, 'he tries to touch me somewhere in my private parts. Then I go to my room and lock the door.' "

---

[1] The parties dispute the length of the interview. Both Camreta and Alford assert that the interview lasted about an hour, while S.G. maintains that it lasted two hours. Because this is a motion for summary judgment, we view the facts in the light most favorable to the non-moving party and so assume that the interview lasted two hours.

- The last incident occurred "'just last week' on the outside of her clothing and she had tried to tell him to stop."
- "The touching of private parts started when she was three."
- "The touching involved the chest and buttock areas, outside of clothing. Her father sometimes 'mumbled' during the touching."
- "Her mother knew about the touching . . . " and it was "'one of our secrets' with her little sister, K.G.'"

Camreta maintains that he "certainly did not coerce [S.G.] or try to induce her into making any accusations."

In contrast, S.G. recounted the interview as follows:

> [Camreta] ask[ed] me if sometimes my dad touched me all over my body. I thought back to the times when my dad hugged me, kissed me, gave me piggy-back rides, rides on his shoulders and horsey rides. I remembered all of my dad's touches with fondness. He was a very loving father, and I loved hugging and kissing him. These were the touches that I was referring to when I said my dad touched me. So I told the man, yes, my dad touches me all over. And then the man started asking me if sometimes those were bad touches, and I said, no they weren't, but he kept asking me over and over again, and I would say, no,

> I don't think my dad touched me in a bad way. He would say, "No, that's not it," and then ask me the same question again. For over an hour, Bob Camreta kept asking me the same questions, just in different ways, trying to get me to change my answers. Finally, I just started saying yes to whatever he said. And then after a while, he said I could go. I believe I was there for two hours.

According to Sarah, later that night S.G. told her that when Camreta asked her what bad things her father had done, she initially told him "nothing," but that Camreta kept asking questions and confused her. S.G. stated that she was "scared" when Friesen left her with Camreta and Alford, although she did not ask to call home, did not ask to have Friesen or her parents with her, and did not cry. With respect to Alford's presence, S.G. stated that she is generally comfortable around police officers, that Alford was nice to her and did not do anything to scare her, and that she trusted him.

Based on the interview and other information he had gathered, Camreta believed that Nimrod had sexually abused S.G. As a result, Camreta and Alford visited the Greenes' home and spoke with Sarah and Nimrod. Both parents denied any sexual abuse but agreed to a safety plan whereby, pending an investigation, Nimrod would not have unsupervised contact with his two daughters, S.G. and K.G. The safety plan also provided that S.G. would undergo a sexual abuse examination at the KIDS Intervention & Diagnostic

Service Center ("the KIDS Center"), which specializes in child sexual abuse. Camreta advised the parents not to speak with their children about the allegations of abuse.

On March 6, 2003, Nimrod was indicted on six counts of felony sexual assault of F.S. and S.G. He was shortly released but ordered not to have any contact with his daughters. That same day counsel for the Greenes informed Camreta that he had been retained to represent the family, that all family members had been advised of their Fifth Amendment right to remain silent and had chosen to invoke that right, and that no one from DHS had permission to meet with a member of the family without counsel present.

The next day, Camreta went to the Greene home to inform Sarah of the court's no-contact order and assess whether Sarah would comply with it. Sarah indicated that she had hired an attorney to defend her husband, that the allegations against him were lies, and that she had talked to S.G. about the allegations of abuse.

Sarah's and Camreta's accounts of the conversation between them on March 7 diverge in two respects. First, with regard to the no-contact order, Sarah stated that she told Camreta:

> [W]hile it would be significantly detrimental to [her] family finances, there was a place [her] husband could stay so that he would have no contact with [her] children. [She] specifically informed Mr. Camreta that [she]

> intended to abide by [the] Safety Plan and that [she] would take the children to the KIDS Center.

In contrast, Camreta maintains that Sarah told him "that she had no extra resources for Nimrod to obtain alternative housing, which [Camreta] understood to mean [Nimrod] would be returning home."

Second, Sarah stated she told Camreta that she "did want [her] children interviewed at the KIDS Center" and "would not interfere with them being interviewed," although she "wished to attend [their] medical examination[s], to be there to help them through the emotionally traumatic event." Camreta maintains that "[Sarah] refused to sign an informational release form to facilitate the pending sex abuse examination of her daughter at the KIDS Center."

Following the March 7 conversation, Camreta was concerned that DHS would not be able to ensure the safety of the children because Sarah denied Nimrod's abuse and was unwilling to place her children's interests over those of her husband. Convinced that he had a duty to take protective action, Camreta decided to seek an order removing both children from Sarah's home.

On March 11, 2003, Camreta petitioned the Deschutes County Juvenile Court for an order removing S.G. and K.G. from the Greene home and placing them in foster care. In an affidavit filed with the Juvenile Court, Camreta represented that "[Sarah] indicated the family had no alternate resources for

either the children or Nimrod to ensure there would be no contact," and that she "refused to sign an information release form for a Kid's Center evaluation for the girls." Citing the letter from the Greenes' counsel, Camreta stated that "[w]ithout access to the family members[ ] and the home DHS is unable to monitor and ensure the safety of the children and unable to ensure that the children receive forensic interviews and exams to determine the health and welfare of S.G. and K.G., and to conclude the investigation."

After reviewing Camreta's petition and affidavit, the Juvenile Court issued a protective custody order authorizing the removal of S.G. and K.G. from the Greene home. DHS took protective custody of S.G. and K.G. the same day.

The next day, the Juvenile Court held an emergency shelter hearing, which both Sarah and Nimrod attended with counsel.[2] At the conclusion of the hearing, the Juvenile Court placed the children in DHS's temporary custody, scheduled KIDS Center

---

[2] The district court characterized the shelter hearing as "an opportunity [for Sarah], with counsel, . . . to challenge the evidence presented in support of the court order." The record, however, contains virtually no information about the shelter hearing, other than the facts that both parents attended with counsel, that counsel was appointed for the children, and that the hearing took one hour and fifteen minutes. The record does not indicate whether the Greenes presented evidence at the emergency shelter hearing to rebut Camreta's assertion that Nimrod was unable to comply with the no-contact order.

assessments for both girls, ordered that the children be made available to participate in those assessments, prohibited Sarah from discussing the case with the children, ordered Nimrod not to have any contact with the children, and directed DHS to return the children to Sarah's care "as soon as [a] safety plan is in place and DHS concerns have been addressed."

DHS had custody of the children from March 11 through March 31, 2003. The two girls lived in a local foster home for those weeks. Sarah's contact with her daughters was limited to pre-arranged, supervised visits.

K.G. was interviewed and examined at the KIDS Center on March 20, 2003, and S.G. was interviewed and examined on March 31, 2003. On the day of K.G.'s examination, Sarah went to the KIDS Center "fully intend[ing] to cooperate with the KIDS Center and lend whatever assistance and support [she] could to [her] daughter." According to her affidavit, however, she was prevented from doing so when KIDS Center staff, acting "under orders of Bob Camreta," forced her "to leave the premises." Sarah was also excluded from the premises during S.G.'s examination.

At her KIDS Center interview, S.G. said that her earlier statements to Camreta concerning Nimrod were not true and that he had not abused her. During the examination, S.G. was told to undress, and the examiners "looked all over [her] body," "took pictures of [her] private parts," and used a magnifying glass scope to visually examine her. In her deposition, S.G.

stated that a doctor asked her to let her know if she felt uncomfortable and told her that the examination would stop if she felt uncomfortable, but that she never told the doctor she felt uncomfortable or asked to stop the interview. She also testified that she felt fine after the examination was over and did not feel sick or upset. In her affidavit, however, S.G. stated, "I wish my mom could have been there. I felt very scared and alone. . . . [T]hey looked all over my body, and it was very uncomfortable."

Ultimately, the KIDS Center examiners could not determine whether S.G. and K.G. had been sexually abused. Even so, they "remained concerned for [S.G.] especially as there appears to be a high likelihood that S.G. may have recanted her statements about her father touching her privates in an attempt to expedite her return home." Despite these concerns, the Juvenile Court, at DHS's request, ordered the children returned to their mother's custody on March 31, 2003.

Nimrod eventually stood trial on charges of sexual abuse but the jury did not reach a verdict. Faced with a retrial, Nimrod accepted an *Alford* plea with respect to the alleged abuse of F.S.[3] The charges concerning S.G. were dismissed.

---

[3] A defendant who enters an *Alford* plea maintains his innocence but admits that sufficient evidence exists from which a judge or jury could find him guilty. *See North Carolina v. Alford*, 400 U.S. 25 (1970).

B. Procedural History

Sarah filed this action on behalf of herself, S.G., and K.G. under 42 U.S.C. § 1983, alleging that: (1) Camreta and Alford's in-school seizure of S.G. without a warrant, parental consent, probable cause, or exigent circumstances violated the Fourth Amendment; (2) Camreta violated the Greenes' rights under the Fourteenth Amendment by intentionally presenting false information to the Juvenile Court to obtain an order to remove the children from Sarah's custody and by removing the children from Sarah's care; and (3) Camreta and the KIDS Center violated the Greenes' Fourteenth Amendment rights by unreasonably interfering with Sarah's right to be with her children and with the children's right to have their mother present during an intrusive medical examination.[4]

---

[4] There were other defendants, claims, and requests for relief in the Greenes' complaint, not pertinent to this appeal.

In particular, the complaint alleged custom and policy claims against Bend LaPine School District and Deschutes County with regard to the seizure of S.G. The district court rejected those claims, and the Greenes' opening brief does not challenge that holding. Any challenge to the dismissal of the claims against the School District and the County has therefore been waived, and the dismissal stands. *See Ind. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003).

The Greenes also brought a claim against Friesen, the school guidance counselor, for her role in removing S.G. from class to conduct the interview. Friesen was sued only in her official capacity. Claims against Friesen in her official capacity are treated as if they had been brought directly against the school

(Continued on following page)

The district court granted summary judgment to all defendants. As to the in-school interrogation, the court held that S.G. had been seized when she was taken from her classroom and interviewed by Camreta and Alford but that the seizure was "objectively reasonable under the facts and circumstances of this case." Moreover, even if the Greenes' constitutional rights had been violated, the district court held, Camreta and Alford were entitled to qualified immunity because "no reasonable school official, caseworker, or police officer would have believed [their] actions violated the Fourth Amendment."

With respect to the removal of S.G. and K.G. from Sarah's custody and Sarah's exclusion from their medical examinations, the court held that there were no due process violations because the girls were removed from Sarah's custody pursuant to a court order and Sarah was given an opportunity to be heard at the custody hearing. The court also concluded that (1) Camreta was, in any event, entitled to absolute quasijudicial immunity regarding the removal of the girls; and (2) excluding Sarah from the examinations did not violate the Fourteenth Amendment because Sarah did not have custody at that time and the examinations conformed with Oregon statutory and administrative law.

The Greenes timely appealed.

---

district, *see Butler v. Elle*, 281 F.3d 1014, 1026 n.9 (9th Cir. 2002), so the dismissal of the suit against Friesen also stands.

II. Analysis

As this case is an appeal from the grant of summary judgment to defendants, we will draw all reasonable inferences in the Greenes' favor. Defendants, as the moving parties, bear the burden of production and persuasion. *Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986). We review the grant of summary judgment *de novo*. *See Blankenhorn v. City of Orange*, 485 F.3d 463, 470 (9th Cir. 2007).

A. School Interview

Before proceeding to the merits of the school interview issue, a note on our reasons for addressing this central constitutional claim on the merits is in order. Ultimately, the question in this case is whether the individual defendants may be held liable in damages to the Greenes. The defendants maintain that even if they violated the Greenes' constitutional rights, they are entitled to qualified immunity and so not liable in damages.

Before the Supreme Court's recent decision in *Pearson v. Callahan*, 129 S. Ct. 808 (2009), courts addressing an official's claim of qualified immunity were required to follow the two-step sequential inquiry established in *Saucier v. Katz*, 533 U.S. 194 (2001), asking first whether the plaintiff alleged violation of a constitutional right and, second, whether that right was clearly established at the time of the conduct at issue. *Pearson* relieved courts of their obligation always to follow this sequence, permitting

"[t]he judges of the district courts and the courts of appeal . . . to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 129 S. Ct. at 818.

Although rigid adherence to the *Saucier* protocol is no longer required, *Pearson* was also careful to note that the *Saucier*'s two-step procedure is "often beneficial," as it "promotes the development of constitutional precedent." *Id.* Such is the case here, where the constitutional standards governing the in-school seizure of a student who may have been abused by her parents are of great importance. As will appear, although other circuits have provided guidance to parents, school officials, social workers, and law enforcement personnel on the issue, we have not. In a similar circumstance arising after *Pearson*, we addressed the constitutional issue on the merits first. *See Stoot v. City of Everett*, 582 F.3d 910, 918 n.8 (9th Cir. 2009) (conducting the constitutional inquiry "where we have not previously addressed whether a police officer may rely solely on the statements of a very young victim of alleged sexual abuse to establish probable cause to seize a potential suspect.") (emphasis altered). *See also Kelsey v. County of Schoharie*, 567 F.3d 54, 61 (2d Cir. 2009) ("The development of constitutional precedent is especially important here, where . . . this Court has not spoken on . . . the constitutionality of clothing exchange procedures in jails."); *Okin v. Vill. of Cornwall-On-Hudson Police Dep't*, 577

F.3d 415, 430 n.9 (2d Cir. 2009) (finding it "necessary to articulate the nature of the claimed violation" before determining whether the right in question was clearly established).

Moreover, the school interview issue does not present a "kaleidoscopic set of facts . . . creat[ing] . . . a classic genuine issue of material fact on the central issue" on which the alleged constitutional violation turns, rendering a constitutional determination too case-specific to aid in clarifying the law for the future. *Mueller v. Auker,* 576 F.3d 979, 994 (9th Cir. 2009). To the contrary, we consider the relatively straightforward question whether an in-school seizure and interrogation of a suspected child abuse victim is always permissible under the Fourth Amendment without probable cause and a warrant or the equivalent of a warrant,[5] as defendants maintain. We therefore address both prongs of the qualified immunity inquiry in this case, to provide guidance to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment.

With that background, we proceed to consider whether, as the Greenes argue, the warrantless, in-school interview of S.G. violated S.G.'s Fourth

---

[5] As discussed *infra,* Part II.A.2, we hold that in the child abuse investigation context, a court order permitting the seizure of a child is the functional equivalent of a warrant.

Amendment rights.[6] The Fourth Amendment guarantees individuals the right "to be secure in their persons . . . against unreasonable searches and seizures . . . " by government officials. U.S. CONST. amend. IV. Camreta and Alford do not contest the district court's holding that the two-hour interview of S.G. at her school was a seizure. We agree with the district court, and with the ruling of the Seventh Circuit in a very similar case, that it was. *See Doe v. Heck*, 327 F.3d 492, 509 (7th Cir. 2003) (holding that student removed from class to be questioned by a caseworker and a uniformed police officer regarding alleged abuse had been seized for Fourth Amendment purposes); *id.* at 510 n.15 (collecting similar cases). The question before us is whether that seizure was "unreasonable."

We have yet to address the principles governing the in-school seizure of a suspected child abuse victim. We have, however, previously held that the warrantless, non-emergency search and seizure of an alleged victim of child sexual abuse at her home violates the Fourth Amendment. *See Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999). *Calabretta* does not resolve the Fourth Amendment issue in this case but goes a fair way towards doing so.

---

[6] The Greenes have not argued that the in-school seizure of S.G. violated Sarah's familial rights under the Fourteenth Amendment, although they have made such a claim with respect to the subsequent removal order and physical examinations. *See Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982).

In *Calabretta*, a social worker received a tip from a neighbor who claimed to have been awakened late at night by a child screaming "No Daddy, no." *Id.* at 810. Suspecting abuse, the social worker, accompanied by a police officer, visited the home, entered without consent, and interviewed and examined the children. *Id.* at 810-12. The family later brought suit, alleging violation of their Fourth Amendment rights.

The defendants in *Calabretta* maintained, primarily, that the search and seizure at the family home was reasonable because "any check on the welfare of children" triggered the "exigent circumstance[s]" exception to the Fourth Amendment's warrant requirement. *Id.* at 811. They also came at the problem another way, arguing that traditional Fourth Amendment protections do not apply to child abuse investigations at all, as such investigations constitute administrative searches requiring neither probable cause nor a warrant. *Id.* at 812. We rejected both arguments, holding both that traditional Fourth Amendment protections apply to child abuse investigations and that the family's right to be free of warrantless searches and seizures in their home, even within the context of a child abuse investigation, was clearly established at the time of the incident. *See id.* at 817. We have reaffirmed our holding in *Calabretta* twice, noting that although the crime of child sexual abuse "may be heinous . . . [this] does not provide cause for the state to ignore the rights of the accused or any other parties." *Wallis v. Spencer*, 202 F.3d 1126,

1130 (9th Cir. 2000); *see also Rogers v. County of San Joaquin*, 487 F.3d 1288, 1291 (9th Cir. 2007).

Defendants insist that *Calabretta* and *Wallis* have nothing to do with this case because S.G. was seized at school rather than at home. Citing the Supreme Court's decision in *New Jersey v. T.L.O.*, defendants argue that searches and seizures[7] in public schools are subject to a special standard of reasonableness, whereby a search or seizure is "reasonable" if it was "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." 469 U.S. 325, 341 (1985), quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1967 [sic]). Defendants urge us to conclude, in other words, that while seizing S.G. and interviewing her at home for two hours would have been unreasonable absent probable cause and a warrant or exigent circumstances, it was reasonable to do a similarly lengthy interrogation in the same way at S.G.'s school. We

---

[7] Although *T.L.O.*, like many of the so-called "special needs" cases listed *infra* note 9, involved a search rather than a seizure, courts have applied the same standard to seizures of students at public schools as to searches. *See Jones v. Hunt*, 410 F.3d 1221, 1228 (10th Cir. 2005) (citing *Edwards v. Rees*, 883 F.2d 882, 844 [sic] (10th Cir. 1989)); *Wofford v. Evans*, 390 F.3d 318, 326 (4th Cir. 2004); *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075, 1079 (5th Cir. 1995). Indeed, the standard enunciated in *T.L.O.* was based on the "reasonableness" standard established in *Terry v. Ohio*, 392 U.S. 1, 20 (1968), which involved a brief seizure for investigative purposes. We therefore draw on Fourth Amendment case law governing both searches and seizures throughout this opinion.

decline to adopt this distinction, for reasons we now explain.

1. *T.L.O.* and the Fourth Amendment in Public Schools

We begin by noting that, despite defendants' heavy reliance upon it, the Supreme Court's decision in *T.L.O.* is at best tangentially related to this case. *T.L.O.* addressed the claims of a high school student whose purse was searched by an assistant vice principal, without a warrant or probable cause, after a teacher discovered two girls smoking in the school lavatory. 469 U.S. at 328. The Court held the search reasonable even in the absence of a warrant or probable cause, explaining that the warrant requirement was "unsuited to the school environment" because it "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *Id.* at 340. The Court similarly noted that the school setting required "some modification of the level of suspicion" needed to justify a search of students, in light of "the substantial need of teachers and administrators for freedom to maintain order in the schools." *Id.* at 340-41. The Court therefore applied a special standard – "reasonableness under all the circumstances" – which "involves a twofold inquiry: first, . . . whether the action was justified at its inception; second, . . . whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in

the first place." *Id.* at 341 (internal citation and quotation omitted).

Defendants maintain that we must apply this standard across-the-board to all searches and seizures in public schools, but the language of *T.L.O.* itself indicates that it was not meant to be read so broadly. The Court expressly noted, for example, that it was addressing only searches "by a teacher or other school official," explaining that "[b]y focusing attention on the question of reasonableness, the standard will spare teachers and administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense." *Id.* at 341, 343. The Court further clarified that it was considering "only searches carried out by school authorities acting alone and on their own authority," expressing "no opinion" on "the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies." *Id.* at 341 n.7.

The Court recently affirmed the narrowness of *T.L.O.*, characterizing it as "h[o]ld[ing] that for searches by school officials a careful balancing of governmental and private interests" requires a showing less than probable cause, and therefore applying "a standard of reasonable suspicion to determine the legality of a school administrator's search of a student." *Safford Unified Sch. Dist. v. Redding*, 129 S.Ct.

2633, 2639 (2009) (internal citation and quotation omitted).[8] *See also Ferguson v. City of Charleston*, 532 U.S. 67, 79 n.15 (2001) (noting that "[i]n *T.L.O.*, [the Court] made a point of distinguishing searches 'carried out by school authorities acting alone and on their own authority' from those conducted 'in conjunction with, or at the behest of law enforcement agencies.'").

S.G. was, of course, seized and interrogated by a social services caseworker and a deputy sheriff. Neither of these individuals qualifies as a "school official." Thus, by its own terms, *T.L.O.* does not control our resolution of S.G.'s Fourth Amendment claim. The Second Circuit has reached the same conclusion we do, holding *T.L.O.* inapplicable to the seizure of a student by a social services agency caseworker. *See Tenenbaum v. Williams*, 193 F.3d 581, 607 (2d Cir. 1999). As the Second Circuit explained, "[p]ublic schools have a relationship with their students that is markedly different from the relationship between most governmental agencies, including [Child Protective Services], and the children with whom they deal. Constitutional claims based on searches or seizures by public school officials relating to public school students therefore call for an analysis . . . that is different from that [for searches or seizures by caseworkers]." *Id.*

---

[8] *Redding* held that a strip search of a girl suspected of possessing prescription ibuprofen was unreasonable under the *T.L.O.* standard.

Moreover, the Court's decision in *T.L.O.* was premised on a "special need" of government not present in this case: "the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds." 469 U.S. at 339. The Court noted that disciplinary problems and student drug use had been rising in recent years, and that "the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." *Id.* It was in light of these considerations that the Court concluded that the school's need swiftly to discipline T.L.O., suspected of smoking in the lavatory in violation of school rules, would be frustrated if school officials were required first to obtain a warrant based on probable cause. *Id.* at 340-41.

In this case, by contrast, S.G. is not suspected of having violated any school rule, nor is there any evidence that her immediate seizure was necessary to "maintain[ ] discipline in the classroom and on school grounds." *Id.* at 339. The "special need" animating the Court's decision in *T.L.O.* is therefore entirely absent.[9] *See Jones v. Hunt*, 410 F.3d 1221, 1228 (10th

---

[9] For the same reason, several of the other school seizure cases relied upon by defendants are inapposite, as they also address situations in which the student was suspected of committing an infraction on school grounds or during a school activity. *See, e.g., Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295 (11th Cir. 2006) (student verbally threatened teacher); *Wofford v.*

(Continued on following page)

Cir. 2005) (holding the *T.L.O.* standard inapplicable to the seizure of a student that did "not involve efforts by school administrators to preserve order on school property").

These distinctions are crucial if we are properly to assess the Fourth Amendment standard applicable to the seizure of an alleged victim of child sexual abuse at her school. "Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place." *T.L.O.*, 469 U.S. at 337. For each "specific class of searches," we determine the appropriate standard of reasonableness by " 'balancing the need to search against the invasion which the search entails.' " *Id.* (quoting *Camara v. Mun. Court*, 387 U.S. 523, 536-37 (1967)). If the seizure of a student at school to investigate sexual abuse by a parent could be said to belong to the same "specific class of searches" as the search of a student's purse to investigate a disciplinary infraction, we would be justified in applying the reasonableness standard outlined in *T.L.O.* to the facts of this case. But *T.L.O.* itself

---

Evans, 390 F.3d 318 (4th Cir. 2004) (student allegedly brought gun to school); *Hassan v. Lubbock Indep. Sch. Dist.*, 55 F.3d 1075 (5th Cir. 1995) (student detained and removed from school field trip due to misbehavior); *Edwards v. Rees*, 883 F.2d 882 (10th Cir. 1989) (student suspected of making a bomb threat); *Cason v. Cook*, 810 F.2d 188 (8th Cir. 1987) (student suspected of breaking into another student's locker); *Tarter v. Raybuck*, 742 F.2d 977 (6th Cir. 1984) (student suspected of dealing drugs at school).

indicates that the two types of searches differ in critical ways. We therefore cannot rely on the balancing of interests in *T.L.O.* to assess the reasonableness of defendants' decision to seize S.G.

2. The "Special Needs" Doctrine & Child Sexual Abuse Investigations

Defendants also argue that, even if the Supreme Court's decision in *T.L.O.* does not strictly control this case, *T.L.O.* stands more generally for the proposition that probable cause and a warrant are not "irreducible requirement[s] of a valid search" or seizure under the Fourth Amendment. *See T.L.O.*, 469 U.S. at 340. That much is quite true. *T.L.O.* belongs to a line of cases in which the Supreme Court has lowered traditional Fourth Amendment protections "when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable."[10] *Griffin v. Wisconsin*,

---

[10] Although the term "special needs" was first used by Justice Blackmun in his concurring opinion in *T.L.O.*, *see* 469 U.S. at 351 (Blackmun, J., concurring), the doctrine is rooted in the Supreme Court's decision in *Camara v. Mun. Court*, 387 U.S. 523 (1967), which addressed the constitutionality of San Francisco's warrantless building inspection program. Since *Camara*, the Court has applied the doctrine in a number of contexts in which such "special needs" exist. *See, e.g., Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (drug testing of high school students participating in extracurricular activities); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995) (random drug testing of high-school athletes); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989) (drug and alcohol testing of railroad employees involved

(Continued on following page)

483 U.S. 868, 873 (1987) (internal quotation omitted). Although defendants acknowledge that neither the Supreme Court nor this court has applied the "special needs" doctrine to searches or seizures of children during a child abuse investigation, they argue that the government's "special need" to protect children from sexual abuse justifies a departure from both the warrant and probable cause requirements in a case such as this one.[11] As noted above, we addressed a

---

in accidents); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (drug testing of employees applying for certain Customs Service positions); *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (search of probationers); *New York v. Burger*, 482 U.S. 691 (1987) (administrative inspections in closely-regulated industries); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (workplace searches of public employees); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (traffic stops at border checkpoints). *But see Ferguson*, 532 U.S. at 84-85 (refusing to extend special needs doctrine to drug testing of pregnant women for law enforcement purposes); *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (refusing to extend doctrine to police roadblocks aimed at detecting narcotics trafficking); *Chandler v. Miller*, 520 U.S. 305 (1997) (refusing to extend doctrine to drug testing of candidates for political office).

[11] The federal district and circuit courts are split on the applicability of the "special needs" doctrine to investigations of child abuse. *Compare Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 406-07 (5th Cir. 2002) (holding the "special needs" doctrine inapplicable given the extensive involvement of law enforcement in investigations of child abuse under Texas law); *Tenenbaum*, 193 F.3d at 606 (applying traditional Fourth Amendment analysis to searches and seizures made in the course of child abuse investigations); *Franz v. Lytle*, 997 F.2d 784, 791 (10th Cir. 1993) (holding "special needs" doctrine inapplicable to investigation of child abuse conducted by law enforcement); *Good v. Dauphin County Soc. Servs.*, 891 F.2d

(Continued on following page)

similar argument in *Calabretta*, holding that traditional Fourth Amendment protections apply to the seizure of a child from her home. We reach the same conclusion in this case, as we now explain.

The threshold inquiry in a "special needs" case is whether the government has identified some need, "beyond the normal need for law enforcement," to justify a departure from traditional Fourth Amendment standards. *Von Raab*, 489 U.S. at 665-66; *see also Ferguson*, 532 U.S. at 74 n.7; *Henderson v. City of Simi Valley*, 305 F.3d 1052, 1056 (9th Cir. 2002). So, although the Supreme Court has "tolerated suspension of the Fourth Amendment's warrant or probable-cause requirement[s] [when] there was no law enforcement purpose behind the searches . . . ,

---

1087, 1093-94 (3d Cir. 1989) (applying traditional Fourth Amendment analysis); *with Doe v. Hagan*, 41 F.3d 571, 575 n.3 (10th Cir. 1994) (applying *T.L.O.*'s lesser standard of reasonableness to the seizure of a student during a child sexual abuse investigation); *Wildauer v. Frederick County*, 993 F.2d 369, 372-73 (4th Cir. 1993) (same); *Darryl H. v. Coler*, 801 F.2d 893, 900-02 (7th Cir. 1986) (applying *T.L.O.*'s lesser standard of "reasonableness" and holding the warrant and probable cause requirements inapplicable). In the Seventh Circuit, the appropriate standard of review under the Fourth Amendment turns on whether the student attends private or public school. *Compare Michael C. v. Gresbach*, 526 F.3d 1008, 1015 (7th Cir. 2008) (holding that caseworkers must comply with the warrant and probable cause requirements when searching and seizing students on private school grounds); *Doe v. Heck*, 327 F.3d 492, 512 (7th Cir. 2003) (same); *with Darryl H.*, 801 F.2d at 900-02 (applying lesser standard of reasonableness to the same conduct on public school grounds).

and . . . little, if any, entanglement with law enforcement" in conducting them, *Ferguson,* 532 U.S. at 79 n.15, the Court hasn't relaxed traditional Fourth Amendment protections when the main purpose of an ostensibly administrative search was to gather evidence for use in subsequent criminal proceedings, or when law enforcement personnel were substantially involved in the design and implementation of the administrative program. Indeed, "[n]one of [the Court's] special needs cases have . . . upheld the collection of evidence for criminal law enforcement purposes." *Id.* at 83 n.20; *see also Edmond,* 531 U.S. at 38. Rather, "[t]he traditional . . . requirements are waived . . . on the explicit assumption that the evidence obtained in the search is not intended to be used for law enforcement purposes." *Ferguson,* 532 U.S. at 88 (Kennedy, J., concurring).

In this case, the presence of law enforcement objectives is evident. At the time of the seizure, police were actively investigating allegations of child sexual abuse against S.G.'s father and a police officer was present at S.G.'s interview. As courts faced with similar "dual-purpose" searches have noted, "disentangling [the goal of protecting a child's welfare] from general law enforcement purposes" becomes particularly "difficult" in these circumstances, as we cannot allow "[o]ther societal objectives [to] justify a program that would systematically collect information for the police." *Roe,* 299 F.3d at 406-07; *see also Ferguson,* 532 U.S. at 83 n.20; *Edmond,* 531 U.S. at 38, 41-42.

Here, we are convinced that law enforcement personnel and purposes were too deeply involved in the seizure of S.G. to justify applying the "special needs" doctrine, for two primary reasons.[12]

First, police were conducting an ongoing investigation of S.G.'s father, and Camreta requested that Deputy Sheriff Alford, a uniformed police officer carrying a visible firearm, accompany him to the interview. A state regulation required Child Protective Service workers to "[i]nterview the child out of the presence of other persons, unless the CPS worker believes the presence of a school employee or other person would facilitate the interview." OR. ADMIN. R. 413-015-0610(4) (2003).[13] There are two apparent ways in which Alford's presence might have "facilitated" the interview. One purpose may have been to gather evidence firsthand, which would clearly run afoul of the Supreme Court's admonition that "[n]one of [its] special needs cases have . . . upheld the collection of evidence for criminal law enforcement purposes." *Ferguson*, 532 U.S. at 83 n.20; *see also Franz*, 997 F.2d at 791. Or perhaps Camreta and Alford believed that "the threat of law enforcement

---

[12] The facts of this case do not require us to decide whether the "special needs" doctrine would apply to an in-school interrogation of a child where there is no direct law enforcement purpose and no involvement of law enforcement personnel.

[13] The regulations cited are those in effect at the time of the events in this case. There have been some changes since. *See* OR. ADMIN. R. 413-015-0415(5) (2009).

intervention" would provide the "necessary leverage" to "facilitate" Camreta's interview with S.G., reasoning that a nine-year-old girl would surely feel compelled to talk truthfully in the presence of a uniformed, armed police officer. *Cf. Ferguson,* 532 U.S. at 72. Either way, the decision to have Alford accompany Camreta to the interview constituted sufficient entanglement with law enforcement to trigger the traditional Fourth Amendment prerequisites to seizure of a person.

Second, we are mindful of the general rule that the constitutionality of a search or seizure cannot turn on the subjective intent of government officials. *See Whren v. United States,* 517 U.S. 806, 813 (1996). But the Supreme Court has allowed a "purpose inquiry in [the 'special needs'] context [if] conducted only at the programmatic level," cautioning that such an inquiry "is not an invitation to probe the minds of individual officers acting at the scene." *Edmond,* 531 U.S. at 48. We therefore look to Oregon law to determine whether "a child protective services search is so intimately intertwined with law enforcement" as to render the "special needs" doctrine inapplicable. *Roe,* 299 F.3d at 407. Our review of Oregon's statutory scheme convinces us that the involvement of law enforcement in this case is symptomatic of the broader entanglement of law enforcement and social services officials in the state's investigation of child abuse.

Under Oregon law, an investigation into alleged abuse begins when a mandatory reporter[14] contacts either "the local office of the Department of Human Services" or "a law enforcement agency within the county." OR. REV. STAT. § 419B.015.[15] Once a report is received, the Department must notify a law enforcement agency, and vice versa. *Id.* Reports are then accorded priority based upon criteria, established by the department, that "enable[s] the department, the designee of the department or a law enforcement agency to quickly and easily identify reports that require notification within 24 hours after receipt." § 419B.017. Either "the department or the agency shall immediately cause an investigation to be made to determine the nature and cause of the abuse of the child." § 419B.020(1). "If the law enforcement agency conducting the investigation finds reasonable cause to believe that abuse has occurred, the law enforcement agency shall notify . . . the local office of the department," which "shall provide protective social services of its own or of other available social agencies to prevent further abuses." § 419B.020(3).

---

[14] A "mandatory reporter" is "[a]ny public or private official having reasonable cause to believe that any child with whom the official comes in contact has suffered abuse or that any person with whom the official comes in contact has abused a child." See OR. REV. STAT. § 419B.010. With certain exceptions, any official with such knowledge "shall immediately report or cause a report to be made" to DHS or local law enforcement. *Id.*

[15] All the remaining citations in this paragraph are also to Oregon Revised Statutes.

Either the law enforcement agency or the department may also take protective custody of the child. § 419B.020(5)(a). If either an officer or a caseworker "has reasonable cause to believe that the child has been affected by sexual abuse . . . and that physical evidence of the abuse exists and is likely to disappear, the court may authorize a physical examination for the purposes of preserving evidence . . . " § 419B.020(6). Moreover, any "person conducting an investigation" under the statute who "observes a child who has suffered suspicious physical injury . . . shall [i]mmediately photograph or cause to have photographed the suspicious physical injuries . . . and [e]nsure that a designated medical professional conducts a medical assessment within 48 hours . . . " §§ 419B.023, 419B.028. Once photographs are taken, the officer or caseworker "shall . . . place hard copies or prints of the photographs . . . in any relevant files pertaining to the child maintained by the law enforcement agency or the department." § 419B.028(2)(b).

The Fifth Circuit, reviewing similar provisions for investigating child abuse under Texas law, held that such joint investigations were not "divorced from the state's general interest in law enforcement," because they functioned "as a tool both for gathering evidence for criminal convictions and for protecting the welfare of the child." *Roe*, 299 F.3d at 406-07 (quotation omitted). We reach the same conclusion here. Oregon's statutory scheme makes no effort to distinguish between criminal investigations of child abuse and civil investigations to protect the victims of

abuse. To the contrary, the provisions described above encourage entanglement between law enforcement and social service workers, by involving both police officers and caseworkers in the gathering and collection of evidence of child sexual abuse from the outset of an investigation.

We do not mean to express any negative judgment concerning the wisdom of Oregon's policy. It may well be that fostering coordination and collaboration between caseworkers and law enforcement officers is an effective way both to protect children and to arrest and prosecute child abusers – each, of course, governmental activity of the highest importance. But we do hold that state officials using such a policy cannot thereby forge an exception to traditional Fourth Amendment protections for the criminal investigation of child sexual abuse, as they seek to do here. Again, "[t]he fact that the suspected crime may be heinous . . . does not provide cause for the state to ignore the rights of the accused or any other parties." *Wallis*, 202 F.3d at 1130.

This is not to say, of course, that the seizure of S.G. was unconstitutional "simply because, in the course of [investigating], an inspecting officer may discover evidence of crimes." *Burger*, 482 U.S. at 716. Any time a government official suspects that a child has been abused, investigation of that abuse for child protection purposes may uncover evidence of a crime. Nor do we suggest that a caseworker conducting an investigation to ensure the welfare of the child is precluded from sharing the fruits of that investigation

with law enforcement officers, who may subsequently use such information to prosecute the offender. *See Ferguson,* 532 U.S. at 80-81, 85; *id.* at 90 (Kennedy, J., concurring).[16]

Rather, we hold, as we did in *Calabretta,* that "the general law of search warrants applie[s] to child abuse investigations." *Calabretta,* 189 F.3d at 814. Once the police have initiated a criminal investigation into alleged abuse in the home, responsible officials must provide procedural protections appropriate to the criminal context. At least where there is, as here, direct involvement of law enforcement in an in-school seizure and interrogation of a suspected child abuse victim, we simply cannot say, as a matter

---

[16] Mandatory reporting laws, which require public and private officials to contact the authorities if they have reasonable grounds to suspect that a child is being abused, *see, e.g.*, OR. REV. STAT. § 419B.010, do not raise the constitutional concerns discussed in the text. As the Supreme Court carefully noted in Ferguson, mandatory reporters come across such information in the course of their normal business and do not intend to elicit or coerce such statements. *See* 532 U.S. at 78 n.13, 80-81; *id.* at 90 (Kennedy, J., concurring). Nothing in our opinion today would prevent a teacher, for example, from discussing suspected abuse with a student or from passing along any such information to social service workers. For "[w]hen a parent sends her child to school, she delegates some of her parenting responsibilities to school officials. Though she does not consent to overzealous investigators interrogating her children over the principal's objection . . . , she should reasonably expect that school officials will speak with her child if the child raises serious concerns about her home life." *United States v. Hollingsworth,* 495 F.3d 795, 802 (7th Cir. 2007).

of law, that she was seized for some "special need[ ], beyond the normal need for law enforcement." *Ferguson*, 532 U.S. at 74 n.7.

In short, applying the traditional Fourth Amendment requirements, the decision to seize and interrogate S.G. in the absence of a warrant, a court order, exigent circumstances,[17] or parental consent[18] was unconstitutional. We follow the lead of our sister circuits and hold that in the context of the seizure of a child pursuant to a child abuse investigation, a court order

---

[17] Exigent circumstances permit a caseworker to seize a child without a warrant if the caseworker has "reasonable cause to believe that the child is likely to experience serious bodily harm in the time that would be required to obtain a warrant." *Rogers*, 487 F.3d at 1294; *see also Burke v. County of Alameda*, 2009 WL 3739333 at *4-5 (9th Cir. 2009) (holding that a child's statements during an interview gave the officer reasonable cause to believe that she was in danger of imminent sexual and physical abuse); *Tenenbaum*, 193 F.3d at 594. The exigent circumstances exception is not applicable here. Defendants waited three days to detain and interrogate S.G. after receiving the initial report from DHS, and then returned her to her parents' custody after the allegedly incriminating interview. Such delays and actions undermine any claimed exigency. *See Rogers*, 487 F.3d at 1296; *Tenenbaum*, 193 F.3d at 595, 605.

[18] S.G.'s parents did not consent to her seizure at school, as defendants did not notify them of the planned interview. The fact that defendants received permission from school officials to conduct the interview does not constitute valid "consent." "The handing over of a child from a public school teacher to another State official . . . is not the equivalent of the consent of the parents." *Tenenbaum*, 193 F.3d at 594 n.9; *see also T.L.O.*, 469 U.S. at 336 (recognizing the limits of the *in loco parentis* doctrine in this context).

permitting the seizure of the child is the equivalent of a warrant.[19] *See, e.g., Tenenbaum,* 193 F.3d at 602; *Doe v. Heck,* 327 F.3d at 517; *Gates v. Texas Dept. of Protective and Regulatory Servs.,* 537 F.3d 404, 429 (5th Cir. 2008). We therefore reverse the district court to the extent that it held that Alford and Camreta had not violated S.G.'s right to be free from an unconstitutional seizure.

B. Qualified Immunity

Even where, as here, government officials have violated citizens' constitutional rights, "[t]he doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson,* 129 S. Ct. at 815 (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). "[Our] inquiry turns on the 'objective legal

---

[19] Here, for instance, Or. Rev. Stat. § 419B.045 specifically authorizes caseworkers to investigate reports of child abuse on public school premises. Section 419B.150 permits an employee of the Department of Human Services or other officer to take a child into protective custody upon an order by the juvenile court. As the statutory scheme thus permits a caseworker to seek a court order for temporary protective custody and permits in-school interviews, it appears that a caseworker could obtain a court order for an in-school interview that complies with the constitution by presenting facts, "supported by Oath or affirmation," to a judge, which facts constitute probable cause to suspect the child has been abused.

reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken.'" *Id.* at 822 (quoting *Wilson v. Layne*, 526 U.S. 603, 614 (1999)); *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987). If a government official "could . . . have reasonably but mistakenly believed that his or her conduct did not violate a clearly established constitutional right," he is entitled to qualified immunity. *Jackson v. City of Bremerton*, 268 F.3d 646, 651 (9th Cir. 2001).

The Greenes bear the burden of demonstrating that the right allegedly violated was clearly established at the time of the incident. *See Galen v. County of Los Angeles*, 477 F.3d 652, 665 (9th Cir. 2007). To meet this burden, the Greenes cite only two cases: our prior decisions in *Wallis* and *Calabretta*. Yet, as defendants correctly argue, neither case is directly applicable, as both involved children seized or searched in their homes. *See Wallis*, 202 F.3d at 1134; *Calabretta*, 189 F.3d at 810. *Calabretta* mentioned this distinction in declining to follow the Seventh Circuit's decision in *Darryl H.*, which permitted in school investigations of child abuse based upon a showing of reasonableness, on the grounds that search and seizure at issue in *Darryl H.* "was not done during an unconstitutional entry into the home." 189 F.3d at 818.

A case directly on point is not necessary to show that a right was "clearly established." *See Anderson*, 483 U.S. at 640. But neither *Wallis* nor *Calabretta* would have put Camreta and Alford on notice that a

social worker's warrantless seizure of a child at her school, even in conjunction with a law enforcement officer, could violate the Fourth Amendment. Some other circuits have applied the "special needs" reasonableness standard to investigations of child abuse, *see supra* note 11. The fact that other courts "disagree[ ] about the contours of a right does not automatically render the law unclear," but here, "these differences of opinion from our own are substantial enough to require immunity." *Redding*, 129 S.Ct. at 2644.

The qualified immunity inquiry cannot end there, however. If the defendants' actions were clearly unconstitutional even on the lesser, "special needs" reasonableness standard they regard – incorrectly, as we have held – as applicable, then qualified immunity would not be available. Their actions could not then be said to be "reasonabl[e], but mistaken[ ]" with regard to whether S.G.'s constitutional rights were violated. *Jackson v. City of Bremerton*, 268 F.3d at 651.

Under the lesser standard of reasonableness applicable in "special needs" cases, we conduct a "twofold inquiry" to determine whether a warrantless search is "reasonable": "first, [we] must consider whether the action was justified at its inception; second, [we] must determine whether the search [or seizure] as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place." *T.L.O.*, 469 U.S. at 341 (internal quotations and citations omitted). Accepting the facts in the light most favorable to S.G., she was

kept for two hours in a closed room by two people she did not know: a caseworker and a uniformed police officer carrying a firearm. Applying the *T.L.O.* standard, Camreta and Alford could have reasonably believed that the decision to seize S.G. was sufficiently justified at its inception. Whether they could reasonably have regarded the seizure "as actually conducted" as reasonable in scope is a considerably closer question, for several reasons.

First, neither Camreta nor Alford have provided any explanation for Deputy Sheriff Alford's presence at the interview. Defendants emphasize that Alford "did not participate in the interview" and "just sat there without asking any questions." These assertions support rather than detract from the conclusion that the seizure was not "reasonably related" to defendants' claimed justification for interfering with S.G.'s liberty interests. Nothing in the record – or common sense – suggests that the silent presence of a uniformed, armed police officer at an interview of a child in a grade school is helpful in any legitimate way to determining whether the child needs child protective services.

Second, the justification in the record for a seizure lasting two hours is weak. Most of the cases relied upon by Camreta and Alford do not address such a prolonged seizure. *See Hassan*, 55 F.3d at 1078, 1080 (holding the detention of a student for disciplinary reasons for 50 minutes reasonable); *Doe v. Bagan*, 41 F.3d 571, 574-75 (10th Cir. 1994) (holding caseworker's decision to seize and question student

alone in the principal's office for ten minutes reasonable); *Edwards v. Rees*, 883 F.2d 882, 884 (10th Cir. 1989) (holding vice principal's twenty-minute interrogation of student alleged to have made bomb threat reasonable). To the contrary, these cases held that the challenged seizures were reasonable in scope precisely because they were "brief," noting, for example, that a "ten minute initial interview with a social services caseworker . . . [is] a de minimis interference with [a student's] liberty, insufficient at that stage to trigger constitutional liberty concerns." *Bagan*, 41 F.3d at 575. The seizure of S.G., who was not herself suspected of any crime, lasted considerably longer than that.

Other cases cited by defendants, however, come closer to sanctioning a two-hour seizure, although the circumstances were quite different. *Wofford v. Evans*, for example, involved the investigatory detention of a student who had allegedly brought a gun to school. *See* 390 F.3d at 321. The student claimed to have been detained for an hour and a half while school officials and law enforcement officers searched the school grounds for a gun. The Fourth Circuit held the detention reasonable in scope because "school officials detained the pupil no longer than necessary to obviate [the unacceptable risk of her retrieving the weapon or revealing its location to a peer]." *Id.* at 327; *see also Shuman v. Penn Manor Sch. Dist.*, 422 F.3d 141, 149 (3d Cir. 2005) (finding a detention lasting "no more than four hours" reasonable); *Couture v. Bd. of Educ. of Albuquerque Pub. Schs.*, 535 F.3d

1243, 1254 (10th Cir. 2008) (holding that a school that had "barricade[d a child] in a closet-like timeout room for one hour and thirty-five minutes" was not unreasonable).

Camreta and Alford seek to justify the length of the seizure by pointing out that as the interview progressed, S.G. began disclosing sexual abuse by her father. S.G. maintains that for "over an hour" she repeatedly told Camreta that her father had never touched her in a bad way until she finally "just started saying yes to whatever he said." It is far from clear that it was reasonable for Camreta and Alford to continue to detain S.G. for an entire hour during which she continually denied such abuse, even if it was reasonable to continue the interview once she started to say otherwise. Still, there is some case law applying the *T.L.O.* standard sanctioning a detention longer than an hour, and none refuting the justification Camreta and Alford offer for prolonging the detention beyond that – namely, that S.G. was just becoming – in their view – responsive.

We are also mindful of the difficult task facing social services caseworkers, who are required to exercise significant discretion in determining whether a child's welfare is in jeopardy. As the Second Circuit has explained,

> Protective services caseworkers [must] choose between difficult alternatives. . . . If they err in interrupting parental custody, they may be accused of infringing the parents' constitutional rights. If they err in not removing

> the child, they risk injury to the child and may be accused of infringing the child's rights. It is precisely the function of qualified immunity to protect state officials in choosing between such alternatives, provided that there is an objectively reasonable basis for their decision, whichever way they make it.

Tenenbaum, 193 F.3d at 596 (quoting *van Emrik v. Chemung County Dep't of Soc. Servs.,* 911 F.2d 863, 866 (2d Cir. 1990)) (alterations in original).

For all these reasons, we hold that defendants in this case are entitled to qualified immunity. We hasten to note that government officials investigating allegations of child abuse should cease operating on the assumption that a "special need" automatically justifies dispensing with traditional Fourth Amendment protections in this context. As noted, we rejected such a claim in *Calabretta,* where state officials argued that "any check on the welfare of children" triggered the "exigent circumstances" exception to the warrant requirement and that seizures conducted during investigations of child abuse were "administrative searches" subject to some lesser standard of reasonableness. 189 F.3d at 811-12. We have never adopted such an exception to traditional Fourth Amendments [sic] standards, and our decision today makes clear that we are unwilling to create an across-the-board exception because a student happens to be seized at a public school rather than on private property.

Because our precedent did not clearly establish that the in-school seizure of a student suspected of being the victim of child sexual abuse can be subject to traditional Fourth Amendment protections, and because, applying the lesser *T.L.O.* standard, the defendants' actions were not so clearly invalid as to strip them of immunity, we affirm the district court's ruling that defendants are entitled to qualified immunity on the Greenes' Fourth Amendment claim.

C. The Removal of S.G. and K.G. from Sarah's Custody

The Greenes also argue that their constitutional rights were violated because S.G. and K.G. were removed from Sarah's custody pursuant to a Juvenile Court order triggered by an intentional misrepresentation by Camreta. In an affidavit provided to the Juvenile Court, Camreta stated that "[Sarah] indicated the family had no alternate resources for either the children or Nimrod to ensure there would be no contact." The Greenes maintain that this representation was materially false, contending that (1) Sarah had agreed to Camreta's proposed "safety plan," under which Nimrod would not have any unsupervised contact with his daughters; and (2) Sarah told Camreta that, even though "it would be significantly detrimental to [the] family finances," she had secured "a place where [Nimrod] could stay so that he would have no contact with [S.G. and K.G.]."

Camreta argues that he is entitled to absolute quasi-judicial immunity for removing the children from the Greene home. A recent en banc decision of this court compels the opposite conclusion.

In *Beltran v. Santa Clara County*, 514 F.3d 906 (9th Cir. 2008) (en banc), we held:

> Parties to section 1983 suits are generally entitled only to immunities that existed at common law. We have therefore granted state actors absolute immunity only for those functions that were critical to the judicial process itself, such as initiating a prosecution. It follows that social workers have absolute immunity when they make discretionary, quasiprosecutorial decisions to institute court dependency proceedings to take custody away from parents. But they are not entitled to absolute immunity from claims that they fabricated evidence during an investigation or made false statements in a dependency petition affidavit that they signed under penalty of perjury, because such actions aren't similar to discretionary decisions about whether to prosecute. A prosecutor doesn't have absolute immunity if he fabricates evidence during a preliminary investigation, before he could properly claim to be acting as an advocate, or makes false statements in a sworn affidavit in support of an application for an arrest warrant. Furthermore, as prosecutors and others investigating criminal matters have no absolute immunity for their investigatory conduct, a

> fortiori, social workers conducting investigations have no such immunity.

Id. at 908-09 (internal citations and quotations omitted). According to the Greenes, Camreta falsely represented that he had been told the family lacked the financial resources to comply with the safety plan, even though Sarah in fact gave repeated assurances that her husband would live elsewhere and have no contact with her daughters. Assuming, as we must, that Sarah's version of events is true, under *Beltran* such a misrepresentation falls outside the scope of the absolute immunity afforded caseworkers.

Camreta relies on our pre-*Beltran* decision in *Mabe v. San Bernardino County Department of Public Social Services*, 237 F.3d 1101 (9th Cir. 2001), for the proposition that "social workers enjoy absolute, quasi-judicial immunity when making post-adjudication custody decisions pursuant to a valid court order." *Id.* at 1109 (internal quotation omitted). *Mabe* provides no support for Camreta's position in this case for two reasons. First, the quoted passage refers specifically to post-adjudication conduct, whereas the Greenes allege that Camreta misrepresented the fruits of his investigation before the Juvenile Court's adjudication of the protective custody order. Second, *Mabe* itself distinguished the presentation of false evidence from other, discretionary decisions made by caseworkers during a child abuse investigation: *Mabe* held that "social workers are entitled to absolute immunity for the initiation and pursuit of dependency proceedings," as well as any "post-adjudication custody decisions,"

but noted that plaintiff's allegations of false evidence in that case failed only "because [plaintiff] failed to offer any evidence of false or perjured testimony" by the caseworker. *Id.*

Camreta is not entitled to qualified immunity as to the false representation claim, as the Greenes' right to be free from judicial deception in securing the removal order was clearly established at the time of Camreta's alleged misrepresentations to the court. We have repeatedly held that "[a] seizure conducted pursuant to a warrant obtained by judicial deception violates the Fourth Amendment." *Whitaker v. Garcetti*, 486 F.3d 572, 581 (9th Cir. 2007) (citing *Butler v. Elle*, 281 F.3d 1014, 1024 (9th Cir. 2002) (per curiam)). "To support a § 1983 claim of judicial deception, a plaintiff must show that the defendant deliberately or recklessly made false statements or omissions that were material to the finding of probable cause." *KRL v. Moore*, 384 F.3d 1105, 1117 (9th Cir. 2004), citing *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1126 (9th Cir. 2002). Whether a false statement was "material" to the finding of probable cause is a question of law for the reviewing court. *KRL*, 384 F.3d at 1117; *Butler*, 281 F.3d at 1024.

More specifically, the right to be free from deception in the presentation of evidence during a protective custody proceeding was clearly established at the time Camreta filed his affidavit with the Juvenile Court. In *Devereaux v. Perez*, 218 F.3d 1045 (9th Cir. 2000), for example, we held in the context of a child abuse proceeding that "the constitutional right to be

free from the knowing presentation of false or perjured evidence" is clearly established. *Id.* at 1055-56. Even earlier, we stated emphatically that "if an officer submitted an affidavit that contained statements he knew to be false or would have known were false had he not recklessly disregarded the truth, . . . he cannot be said to have acted in an objectively reasonable manner, and the shield of qualified immunity is lost." *Hervey v. Estes*, 65 F.3d 784, 788 (9th Cir. 1995) (internal quotations and citation omitted); *see also Butler*, 281 F.3d at 1024; *Whitaker*, 486 F.3d at 582 (concluding that "the contours of the Fourth Amendment right against judicial deception" were clearly established by 1996). *See also Snell v. Tunnell*, 920 F.2d 673 (10th Cir. 1990) (holding social workers who deliberately fabricated evidence of child sexual abuse to secure a removal order not entitled to qualified immunity).

The Greenes have presented proof, in the form of Sarah's affidavit and deposition testimony, that Camreta included false statements in his affidavit requesting a protective custody order. According to Sarah, she told Camreta that there was a place for Nimrod to stay so that he would not have any contact with their daughters. Camreta's sworn affidavit states precisely the opposite, claiming that Sarah indicated the family lacked the financial resources to secure alternate housing for Nimrod. These conflicting accounts of the same conversation create a genuine factual dispute as to whether Camreta intentionally or recklessly misrepresented his conversations with

Sarah in an effort to persuade the court to remove the children from her custody.[20]

The alleged misrepresentation was "material" to the granting of the removal order if the Juvenile Court would have declined to issue the order had Camreta been truthful. *See Butler*, 281 F.3d at 1026. The sole evidence presented against Sarah's continued custody of her daughters consisted of Camreta's contested assertion that she was unwilling or unable to prevent Nimrod from having contact with her daughters.[21] There was no basis for the Juvenile Court to remove S.G. and K.G. from *Sarah*'s custody, unless Sarah was failing to take the requisite steps to protect her daughters from Nimrod. "The government may not, consistent with the Constitution, interpose itself between a fit parent and her children simply

---

[20] If Camreta did not misrepresent what Sarah told him, or if he negligently misrepresented her statements, his conduct did not violate the Constitution. But whether either is the case is a question for the trier of fact, not for this court. *See Butler*, 281 F.3d at 1024.

[21] This issue is complicated by the fact that the record does not contain any evidence regarding Sarah's response to Camreta's claims at the Juvenile Court hearing. The record indicates that Sarah was present and represented by counsel, and she presumably had an opportunity to rebut Camreta's assertions. Transcripts from the Juvenile Court hearing were not included in the district court record, so it is impossible to know whether or how Sarah responded to Camreta's version of the events at issue. If Sarah essentially ratified Camreta's account of their March 7 conversation at the hearing, Sarah's claim that Camreta intentionally misrepresented her statements to the Juvenile Court would be refuted.

because of the conduct – real or imagined – of the other parent." *Wallis*, 202 F.3d at 1142 n.14. Camreta's alleged misrepresentation provided crucial evidence for determining whether the girls remained in sufficient danger in Sarah's custody to warrant a protective custody order. In all likelihood, the Juvenile Court would not have issued its order absent Camreta's allegation that Sarah was unable to provide alternate housing for Nimrod.

Because Camreta's alleged misrepresentation in support of his request for a protective custody order – again, assuming it occurred – violated the Greenes' clearly established rights, he is not entitled to qualified immunity. The district court's grant of summary judgment to Camreta on the Greenes' Fourteenth Amendment claims stemming from the removal order is therefore reversed.

D. The Children's Medical Examinations Outside Their Mother's Presence

Finally, the Greenes assert a separate claim under the Fourteenth Amendment premised on Camreta's decision to exclude Sarah from her daughters' physical examinations at the KIDS Center. Specifically, the Greenes argue that Sarah's exclusion violated her "substantive due process right to be there for her children," as well as S.G. and K.G.'s right "to have their mother there when they face

potentially traumatic events, such as the exams [performed at the KIDS Center]." We agree.[22]

Wallis directly addressed the constitutionality of investigatory physical examinations of children outside their parents' presence. We stated:

> [P]arents have a right arising from the liberty interest in family association to be with their children while they are receiving medical attention (or to be in a waiting room or other nearby area if there is a valid reason for excluding them while all or a part of the medical procedure is being conducted). Likewise, children have a corresponding right to the love, comfort, and reassurance of their parents while they are undergoing medical procedures, including examinations – particularly those . . . that are invasive or upsetting. The interest in family association is particularly compelling at such times, in part because of the possibility that a need to make medical decisions will arise, and in part because of the family's right to be together during such difficult and often traumatic events.

---

[22] Camreta initially argued that he was entitled to absolute, quasi-judicial immunity for executing the Juvenile Court's order, but at oral argument conceded that he is not. The concession is well-taken. Camreta was not executing a court order when he made the decision to exclude Sarah from the KIDS Center assessments, as the order said nothing about excluding Sarah from the examinations.

Wallis, 202 F.3d at 1142. This passage from *Wallis* establishes two points central here: first, parents and children maintain clearly established familial rights to be with each other during potentially traumatic medical examinations; and second, this right may be limited in certain circumstances to presence nearby the examinations, if there is some "valid reason" to exclude family members from the exam room during a medical procedure.

Even if Camreta had a valid reason to exclude Greene from K.G.'s medical exam, which we do not decide, *Wallis* held that parents have a right to be present at medical examinations of their children *or* "to be in a waiting room or other nearby area if there is a valid reason for excluding them." *Id.* at 1142. In this case, according to Sarah, she "was ordered by the staff of the KIDS Center, who were under orders of Bob Camreta, to leave the premises" entirely, depriving her of any opportunity to comfort her children even after the examinations had been completed. Prohibiting Sarah from remaining in an adjoining or nearby room violated her constitutional right under *Wallis*.

The language of *Wallis* is clear and unambiguous: government officials cannot exclude parents entirely from the location of their child's physical examination absent parental consent, some legitimate basis for exclusion, or an emergency requiring immediate medical attention. *Id.* at 1141-42. The KIDS Center assessments involved the visual inspection and photographing of the children's genitals. This process could

certainly be emotionally traumatic to a young girl. *Cf. Redding*, 129 S.Ct. at 2642 (citing a study concluding that strip searches can "result in serious emotional damage."). The children's right to their mother's comfort and their mother's right to provide such comfort were thus at their apex. Camreta's decision to exclude Sarah not just from the examination but from the entire facility where her daughter was being examined violated the Greenes' clearly established rights.[23]

We therefore reverse the district court's grant of summary judgment to Camreta on this claim as well.

---

[23] We note that there was no state administrative rule to the contrary. Oregon Administrative Rule 413 015-0720 sets forth "interviewing rules" for child protective services, providing, *inter alia*, that "[i]f the parent or caregiver is the alleged abuser or if the presence of the parent or caregiver might impede the interview, the CPS worker may interview children independent of their parents or caregivers." OR. ADMIN. R. 413-015-0720(4) (2003). These rules were intended to govern initial interviews with victims of suspected abuse, a point made quite clear by the very next sub-part of the rule, which provides separate guidelines for initial physical examinations. *See* OR. ADMIN. R. 413-015-0720(5) (2003). The State's regulatory scheme thus reflected a concern that the presence of a victim's parents might impermissibly influence the child's answers to a caseworker's questions, not a license to exclude a parent from the premises on which a physical examination is occurring. (These regulations have been revised and now appear at OR. ADMIN. R. 413-015-0420 and OR. ADMIN. R. 413-015-0415.)

III. Conclusion

In sum, we hold that Camreta and Alford are entitled to qualified immunity with respect to S.G.'s Fourth Amendment claims and affirm the district court's grant of summary judgment on that basis. With respect to the Greenes' Fourteenth Amendment claims regarding the removal order, we conclude that there is a genuine issue of material fact as to whether Camreta secured the order by misrepresenting his conversations with Sarah. We therefore reverse the district court's grant of summary judgment on that claim. Finally, we hold that Camreta's decision to exclude Sarah from her daughters' medical examinations at the KIDS Center violated the Greenes' clearly established familial rights under the Fourteenth Amendment. We therefore reverse the district court's grant of summary judgment on that claim as well.

AFFIRMED in part, **REVERSED** in part, and **REMANDED.**

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Plaintiff,

v.

BOB CAMRETA; DESCHUTES COUNTY DEPUTY SHERIFF JAMES ALFORD; DESCHUTES COUNTY; JANE DOE; BOB SMIT; THE KIDS CENTER; THE BEND-LaPINE SCHOOL DISTRICT; and TERRY FRIESEN,

Defendants.

Civ. No. 05-6047-AA

OPINION AND ORDER

Mikel R. Miller
Law Office of Mikel R. Miller, P.C.
26 N.W. Hawthorne
Bend, Oregon 97701
Attorney for plaintiff

Hardy Myers
Attorney General
David L. Kramer
Assistant Attorney General
Department of Justice
1162 Court Street N.E.
Salem, Oregon 97301
Attorneys for defendant Bob Camreta

Mark P. Amberg
Christopher D. Bell
Deschutes County Legal Counsel
1300 N.W. Wall Street, Suite 200
Bend, Oregon 97701
Attorneys for defendants Deschutes County
Deputy Sheriff James Alford and
Deschutes County

Mark H. Wagner
Kari A. Furnanz
Hoffman, Hart & Wagner, LLP
1000 S.W. Broadway, 20th Floor
Portland, Oregon 97205
Attorneys for defendants Terry Friesen and
Bend-LaPine School District

AIKEN, Judge:

Plaintiff filed this suit on behalf of herself and her minor children, S.G. and K.G., pursuant to 42 U.S.C. § 1983, alleging that defendants violated their constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution. Plaintiff also alleges state law claims of false imprisonment and intentional infliction of emotional distress against defendants Bob Camreta and

Deschutes County Deputy Sheriff James Alford. Pursuant to the court's Opinion and Order dated September 22, 2005, defendants Bob Smit and the KIDS Center are no longer parties to this action. All remaining defendants now move for summary judgment on each of plaintiffs' claims pursuant to Fed. R. Civ. P. 56© [sic]). For the following reasons, defendants' motions are granted.

BACKGROUND

On February 12, 2003, Nimrod Greene, plaintiff's husband and the father of S.G. and K.G., was arrested for suspected sexual abuse of F.S, a seven-year-old child.

On February 20, 2003, the Oregon Department of Human Services (DHS) received a report from the Deschutes County Sheriff's Office describing the circumstances of Greene's arrest and reporting possible sexual abuse of S.G. and K.G. by Greene.

On February 21, 2003, Bob Camreta, a Child Protective Services (CPS) caseworker for DHS, learned that Greene had been released on bail and was at home having unsupervised contact with S.G. and K.G, who were nine and five years old at the time, respectively.

On February 24, 2003, Camreta interviewed S.G. at her public elementary school. Camreta was attempting to assess whether S.G. and K.G. had been abused by Greene, and he did not seek or obtain

parental consent for the interview. Upon Camreta's request, defendant Terry Friesen, a female counselor at Elk Meadow Elementary School, walked to S.G.'s classroom and asked S.G. to accompany Friesen so that someone could talk to her. S.G. complied, and Friesen brought her to another room where defendants Camreta and Deputy Alford were present. Friesen then left the room.

For approximately one to two hours, S.G. sat at a table with Camreta while he interviewed her. According to Camreta, S.G. disclosed that she had been sexually abused by her father at her home, and that the last time it occurred was "last week." Affidavit of Bob Camreta (Camreta Aff.), ¶ 5. S.G. stated that the "touching" occurred after her father had been drinking alcohol, and that S.G. had told plaintiff about the touching. *Id.* and Ex. 3.

After the interview, Camreta, accompanied by Deputy Alford, spoke with plaintiff and Greene about S.G.'s statements. Both parents denied sexual abuse, but plaintiff agreed to a safety plan requiring that Greene not have unsupervised contact with the children pending an investigation. The plan also provided that S.G. would undergo a sexual abuse examination at the KIDS Center, a medical center specializing in child sex abuse. Camreta advised plaintiff not to discuss the alleged abuse with S.G. or K.G.

On March 6, 2003, an indictment was returned charging Greene with six counts of felony sexual

abuse in the first degree against F.S. and S.G. Following the indictment, Greene was released pursuant to a court-ordered agreement, dated March 19, 2003, requiring that he have no contact with children, including S.G. and K.G.

On March 7, 2003, Camreta went to plaintiff's home to assess whether she would comply with the no-contact order. Plaintiff stated to Camreta that the charges were a lie, that she had hired an attorney to defend her husband, and that she had talked to S.G. about the alleged abuse. Plaintiff told Camreta that she had no extra resources for alternative housing for Greene and would not sign the information release form for the sexual abuse examination. Plaintiff asserts that she did, however, also tell Camreta that Greene would have no contact with the children and that she would find alternative housing regardless of the cost.

On March 11, 2003, Camreta successfully petitioned the Deschutes County Juvenile Court for an order to place S.G. and K.G. in protective custody. The same day, S.G. and K.G. were taken into DHS custody pursuant to the court order.

On March 12, 2003, the Deschutes County Juvenile Court held an Emergency Shelter Hearing, at which plaintiff, Greene, and their attorneys appeared. Following the hearing, the court issued an order keeping the children in state custody and ordering sexual abuse examinations of both S.G. and K.G.

The children were in state custody from March 11, 2003, through March 31, 2003, and during that time plaintiff's contact with them was limited to pre-arranged, supervised visitation, and she was not allowed to be present during their evaluation at the KIDS Center. K.G. was interviewed and examined on March 20, 2003, and S.G. was examined on March 31, 2003. During her examination, K.G. informed doctors that S.G. had lied about the sexual abuse allegations, because she overheard plaintiff telling S.G. that she had lied. Camreta Aff., Ex. 10, p. 9. Ultimately, the KIDS Center evaluators were unable to determine if S.G. and K.G. had been sexually abused, and S.G. recanted the statements she had previously made to Camreta.

On March 31, 2003, a hearing was held at the Deschutes County Juvenile Court, which Camreta, plaintiff, Greene, and their attorneys attended, along with an attorney for S.G. and K.G. The court ordered that S.G. and K.G. be returned to the custody of their mother at the request of all parties present at the hearing.

On February 24, 2005, plaintiff filed this action.

STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to

a judgment as a matter of law." Fed. R. Civ. P. 56© [sic]). The materiality of a fact is determined by the substantive law on the issue. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Assoc.*, 809 F.2d 626, 630 (9th Cir. 1987). The authenticity of a dispute is determined by whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The moving party has the burden of establishing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. *Id.* at 324.

Special rules of construction apply to evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. *T.W. Elec. Serv.*, 809 F.2d at 630-31.

DISCUSSION

A. Fourth Amendment Claims

1. Individual Defendants

In Counts 1 and 3, plaintiff alleges that defendants Camreta, Deputy Alford, and Friesen violated

S.G.'s right to be free from unreasonable seizure under the Fourth Amendment to the United States Constitution when S.G. was interviewed at her school.

Under the Fourth Amendment, a seizure occurs when an individual's freedom of movement is restrained by physical force or show of authority. *United States v. Mendenhall*, 446 U.S. 544, 553 (1980). A person has been "seized" only if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed he was not free to leave." *Id.* at 554. Thus, an objective standard applies in determining whether a seizure occurred. *See id.* at 554-55.

I find that the evidence presented supports a finding that S.G. was seized. S.G. was escorted from her classroom by her school counselor and taken to a room where she was interviewed for approximately one to two hours by a CPS caseworker in the presence of a sheriff's deputy. Although plaintiff presents no evidence that defendants had any physical contact with S.G., told S.G. she was not free to leave, or suggested she could not leave, I question whether any reasonable nine-year old would believe that she was free to leave under those circumstances. *See Doe v. Heck*, 327 F.3d 492, 510 (7th Cir. 2003) (removal of 11-year old boy from classroom and questioning by caseworkers and uniformed police officer constituted seizure under the Fourth Amendment).

However, I do not find that the seizure of S.G. was unreasonable in light of the circumstances and the information known to Camreta. A seizure violates the Fourth Amendment only if it is objectively unreasonable in light of the facts and circumstances confronting the defendants, regardless of subjective intent or motivation. *See Graham v. Connor,* 490 U.S. 386, 397 (1989) (citing *Scott v. United States,* 436 U.S. 128, 137-39 (1978)). A seizure is reasonable if it was "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry v. Ohio,* 392 U.S. 1, 20 (1968).

For example, in *Doe v. Bagan,* a child, Doe, brought suit under § 1983 after a social services worker questioned him for his alleged sexual abuse of another child. 41 F.3d 571, 573 (10th Cir. 1994). The social services worker interviewed Doe alone in the principal's office for approximately ten minutes with the door closed. *Id.* at 574. The Tenth Circuit found that this seizure was reasonable as a matter of law. *Id.* at 574 n.3. Specifically, the court found that the seizure was justified at its inception because the abused child specifically identified Doe as her abuser and that the interview was reasonably related in scope to determine Doe's involvement in the incident. *Id.*

Likewise, I find that the interview of S.G. was justified at its inception. It is undisputed that defendants were responding to the recent arrest of Greene for sexually abusing another child, along with

information suggesting that S.G. and K.G. were being sexually abused by Greene and that plaintiff had knowledge of the abuse. Camreta Aff., Ex. 2, p. 1. Thus, the information known to Camreta and Deputy Alford gave rise to reasonable suspicion that the children had been abused or were in danger of being abused. *See Wallis v. Spencer,* 202 F.3d 1126, 1138 (9th Cir. 2000). Further, Camreta and Deputy Alford received permission from school officials to speak with S.G. regarding the alleged abuse.

I also find that the scope of the interview was reasonably related to determining whether such abuse had occurred. Given S.G.'s statements and disclosures regarding sexual abuse by Greene and plaintiff's knowledge of that abuse, it is not unreasonable that the interview lasted one to two hours. Camreta was not only attempting to protect S.G. from possible sexual abuse, he was fulfilling his statutory duty to investigate suspected sex abuse of a minor. *See* Or. Rev. Stat. § 419B.020 (requiring DHS or law enforcement to investigate a claim of child abuse immediately after a report has been made); Camreta Aff., ¶ 2. For the same reasons, defendants Friesen's and Deputy Alford's actions to facilitate this interview were likewise reasonable. Therefore, even though S.G. was seized, I find that the seizure was objectively reasonable under the facts and circumstances of this case.

Moreover, defendants Camreta, Deputy Alford, and Friesen are entitled to qualified immunity. Assuming a constitutional violation occurred, the

court considers two issues: (1) whether the law governing the official's conduct was clearly established; and (2) whether, under that law, a reasonable official could have believed his or her conduct was lawful. *Mena v. City of Simi Valley,* 226 F.3d 1031, 1036 (9th Cir. 2000); *see also Saucier v. Katz,* 533 U.S. 194, 201 (2001). Qualified immunity is intended to protect "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986).

Oregon law expressly permits CPS workers to interview a child at school "when the worker believes it will be the best environment in which to make contact with the child." Or. Admin. R. 413-015-0610. While the school administrator must be notified of such an interview, Oregon law does not always require notice to the child's parents. *See* Or. Rev. Stat. § 419B.045 (requiring notice to the school administrator, but failing to require any notice to the child's parents); *see also* Or. Admin. R. 413-015-0405(8) (giving CPS employees discretion not to notify parents of an interview when notification could compromise the child's safety or a criminal investigation).

Given this statutory and administrative authority, I find as a matter of law that a reasonable official could believe his or her actions pursuant to this authority are within constitutional bounds. *Heck,* 327 F.3d at 516. Plaintiff raises no challenge to any of these statutes or administrative rules, and the court finds no reported decision rendering them unconstitutional. *Id.* Therefore, when Friesen, Camreta, and

Deputy Alford seized and interviewed S.G., no reasonable school official, caseworker, or police officer would have believed these actions violated the Fourth Amendment. Therefore, plaintiff's Fourth Amendment claims against defendants Camreta, Deputy Alford, and Friesen brought on behalf of S.G. are dismissed.

2. Defendants Deschutes County and Bend-LaPine School District

In Counts 2 and 4, plaintiff alleges that Deschutes County and Bend-LaPine School District each have a custom and policy of "seizing children from classrooms and subjecting them to custodial police interrogations without a warrant, parental consent, or probable cause and exigent circumstances" that violated S.G.'s Fourth Amendment rights.

A local government entity may be held liable under § 1983 if the entity itself causes the constitutional violation. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691 (1978); *see also Bd. of the County Comm'rs v. Brown*, 520 U.S. 397, 403 (1997). Thus, plaintiff cannot rely on theories of respondeat superior or vicarious liability to recover against defendants. *Brown*, 520 U.S. at 403; *Duvall v. County of Kitsap*, 260 F.3d 1124, 1141 (9th Cir. 2001). Rather, plaintiff's § 1983 claim survives only where the alleged constitutional deprivation was inflicted in

"execution of a government's policy or custom." *Monell*, 436 U.S. at 694.

However, plaintiff fails to establish a violation of S.G.'s Fourth Amendment rights or produce evidence that either Deschutes County or the School District has an official policy or custom that authorizes custodial police interrogations as alleged by plaintiff. Likewise, plaintiff fails to show the existence of a widespread practice that is "so permanent and well settled as to constitute a 'custom or usage' with the force of law." *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 111, 168 (1970)). Accordingly, plaintiff's Fourth Amendment claims brought against Deschutes County and Bend-LaPine School District on behalf of S.G. are dismissed.

B. Fourteenth Amendment Claims

Plaintiff next alleges that defendants Deschutes County, Bend-LaPine School District, and Camreta violated plaintiff and her children's substantive due process rights under the Fourteenth Amendment to be free from unreasonable interference with the family relationship. Specifically, in Counts 2 and 4, plaintiff alleges that Deschutes County's and the School District's customs and policies of seizing and questioning students violated plaintiff's and S.G.'s Fourteenth Amendment rights.

However, plaintiff cannot obtain relief on behalf of S.G. through a substantive due process claim

under the Fourteenth Amendment when the challenged conduct falls under a more specific constitutional right. *Albright v. Oliver,* 510 U.S. 266, 272-75 (1994); *Graham,* 490 U.S. at 394-95. "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.'" *Albright,* 510 U.S. at 273 (quoting *Graham,* 490 U.S. at 395). Here, the issue of whether Deschutes County and the School District have unconstitutional policies of seizing students for questioning without parental consent implicates S.G.'s Fourth Amendment rights.[1]

With respect to the alleged violation of plaintiff's Fourteenth Amendment rights, as discussed above, plaintiff presents no evidence that either the School District or Deschutes County has a policy or custom permitting the questioning of children without parental consent that unreasonably interferes with a parent's rights to control the care of a child. While the

---

[1] In Count 3 of her Complaint, plaintiff alleges that Camreta's interview of S.G. at school violated S.G.'s Fourth Amendment rights. However, in her response to defendants' motions for summary judgment, she states that Count 3 also alleges a Fourteenth Amendment violation. As discussed above, I find that plaintiff cannot pursue a substantive due process claim on behalf of S.G. because the school interview is properly evaluated under the Fourth Amendment. Therefore, I construe Count 3 as alleging only a Fourth Amendment violation.

School District admits that it facilitates law enforcement interviews of students, this policy is contemplated and endorsed by state law. Or. Rev. Stat. § 419B.045. Moreover, the "right to family integrity clearly does not include a constitutional right to be free from child abuse investigations." *Manzano v. South Dakota Dep't of Soc. Servs.*, 60 F.3d 505, 510 (8th Cir. 1995) (internal quotation marks and citation omitted); *see also Wilkinson ex rel. Wilkinson v. Russell*, 182 F.3d 89, 104 (2d Cir. 1999) ("An investigation passes constitutional muster provided simply that case workers have a 'reasonable basis' for their findings of abuse."). Accordingly, plaintiff's Fourteenth Amendment substantive due process claims against Bend-LaPine School District and Deschutes County brought on behalf of herself and S.G. must be dismissed.

In Counts 5 and 7, plaintiff argues that defendant Camreta unreasonably interfered in the family relationship of plaintiff, S.G., and K.G. by: (1) removing S.G. and K.G. from plaintiff's custody, and (2) denying plaintiff's request to be present with S.G. and K.G. during the children's physical examinations at the KIDS Center.[2]

---

[2] Plaintiff also alleged a Fourteenth Amendment claim against a Jane Doe defendant based on her participation in the medical examinations of S.G. and K.G. However, plaintiff failed to identify this defendant or present facts or argument supporting the claims against her. Therefore, plaintiff's claims against defendant Jane Doe are dismissed.

It is well-settled that parents and children possess a constitutional right to be together without governmental interference. *Santosky v. Kramer,* 455 U.S. 745, 753 (1982); *Stanley v. Illinois,* 405 U.S. 645 (1972); *Pierce v. Soc'y of Sisters,* 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska,* 262 U.S. 390 (1923). "That right is an essential liberty interest protected by the Fourteenth Amendment's guarantee that parents and children will not be separated by the state without due process of law except in an emergency." *Wallis,* 202 F.3d at 1136. Here, however, plaintiff received due process of law, because S.G. and K.G. were removed from her custody pursuant to a court order, and plaintiff was given the opportunity to be heard at the custody hearing.

Moreover, I find that Camreta is entitled to quasi-judicial immunity for his actions. A CPS worker such as Camreta is accorded absolute quasi-judicial immunity from liability for damages stemming from the worker's apprehension of a child pursuant to a valid court order. *Coverdell v. Dep't of Soc. & Health Servs.,* 834 F.2d 758, 762 (9th Cir. 1987); *Abdouch v. Burger,* 426 F.3d 982, 989 (8th Cir. 2005). "The fearless and unhesitating execution of court orders is essential if the court's authority and ability to function are to remain uncompromised." *Coverdell* 834 F.2d at 765.

Here, it is undisputed that Camreta removed S.G. and K.G. from plaintiff's custody to enforce the court order granting protective custody of the children to the state. Although plaintiff argues that

Camreta obtained the court order by presenting false information to the court and deliberately misrepresenting S.G.'s statements, plaintiff presents no evidence to support these allegations. Furthermore, plaintiff had an opportunity, with counsel, at the March 12, 2003, hearing to challenge the evidence presented in support of the court order.

Likewise, Camreta is entitled to immunity for excluding plaintiff from S.G. and K.G.'s medical examinations. Plaintiff did not have legal custody of the children at the time, the court ordered the examinations of S.G. and K.G., and plaintiff's exclusion from the examinations conformed with Oregon statutory and administrative law. *See* Or. Rev. Stat. § 419B.337 (stating that after a child is placed in state custody, DHS has discretion in the planning and provision of care, supervision, and services); Or. Admin. R. 413-015-0720(4) (allowing DHS workers to exclude an abused child's parent if the parent's presence may impede the interview). Accordingly, plaintiff's Fourteenth Amendment claims against Camreta brought by plaintiff and on behalf of herself, S.G. and K.G. are dismissed.

C. State Law Claims

Finally, plaintiff alleges state law claims of false imprisonment and intentional infliction of emotional distress (IIED) against defendants Camreta and

Deputy Alford based on their interview of S.G. at school.[3]

Pursuant to the Oregon Tort Claims Act (OTCA), Or. Rev. Stat. §§ 30.260-.300, a lawsuit alleging a tort committed by a public body or by its officers, employees, or agents acting within the scope of employment must be brought against the public body only. *Id.* § 30.265(1). A "public body" includes the state, as well as counties, cities, school districts, and other similar entities. *See id.* § 30.260(4). When a tort claim is brought against public employees for actions taken within the scope of their employment, the public body shall be substituted as the only defendant. *Id.* § 30.265(1); *see also Ctr. for Legal Studies, Inc. v. Lindley,* 64 F. Supp. 2d 970, 974-76 (D. Or. 1999). Plaintiff has not disputed that both Camreta and Deputy Alford were acting within the scope of their employment. Therefore, in accordance with the OCTA, the State of Oregon and Deschutes County are substituted as the proper defendants in place of Camreta and Deputy Alford with respect to plaintiff's state law claims.

Upon substitution, plaintiff's tort claims against the State of Oregon based on Camreta's actions must be dismissed under the Eleventh Amendment to the United States Constitution. It is well established that

---

[3] Plaintiff has agreed to dismiss her claim of malicious prosecution alleged against defendant Camreta in Count 6 of her Complaint.

a State is immune from claims brought in federal court by a citizen unless the State has given unequivocal consent to be sued or Congress has abrogated the immunity. *See, e.g., Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 540-542 (2002); *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 97-100 (1984). While the State of Oregon has consented under the OTCA to be sued for certain torts in state court, it has not consented to be sued for such claims in federal court. *See* Or. Rev. Stat. § 30.265(1); *see also Blair v. Toran*, 1999 WL 1270802 (D. Or. Dec. 2, 1999). Therefore, plaintiff's state law claims against the State of Oregon on behalf of S.G. are dismissed.

Plaintiff's state law claims against Deschutes County must be dismissed as well. In general, Eleventh Amendment immunity does not apply to counties and similar municipal corporations. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977); *but see Pennhurst*, 465 U.S. at 123 n.34 (describing cases where immunity applies because the relief obtained runs against the State). However, plaintiff fails to show a genuine issue of material fact as to S.G.'s claims of false imprisonment and IIED.

First, to establish a claim of false imprisonment, plaintiff must show that: (1) Deputy Alford confined S.G.; (2) Deputy Alford intended the acts that caused the confinement; (3) S.G. was aware of the confinement; and (4) the confinement was unlawful. *Hiber v.*

Creditors Collection Serv. of Lincoln County, Inc., 154 Or. App. 408, 413, 961 P.2d 898, *rev. denied*, 327 Or. 621, 971 P.2d 413 (1998). Confinement may be created through actual force or through threats, which may be by conduct or words. *Lukas v. J.C. Penney Co.*, 233 Or. 345, 353, 378 P.2d 717 (1963). "If the words or conduct are such as to induce a reasonable apprehension of force and the means of coercion are at hand, a person may be . . . effectively restrained." *Id.*

Here, plaintiff fails to present any evidence creating a genuine issue of material fact that Deputy Alford confined S.G. or intended to do so. First, S.G.'s deposition reveals that Deputy Alford treated S.G. nicely, that he did nothing to scare her, and that she trusted him. Furnanz Aff., Ex. C, pp. 25-26. Deputy Alford also did not take any part in the interview; he simply "sat there in the room."[4] Furnanz Aff., Ex. C, p. 149. Further, plaintiff presents no evidence of any physical contact or coercive behavior on Deputy Alford's part, and his mere presence as a police officer does not create coercion or confinement. *See Florida v. Royer*, 460 U.S. 491, 498 (1983) (stating that a person being identified as a police officer, without more, does not convert an encounter into a "seizure"). Therefore, plaintiff fails to raise a genuine issue of

---

[4] Plaintiff argues that Deputy Alford still had a duty to intervene in Camreta's interview to stop the violation of S.G.'s Fourth Amendment rights. However, because there was no violation of S.G.'s constitutional rights, this argument is moot.

material fact that S.G. was falsely imprisoned by Deputy Alford, and plaintiff's false imprisonment claim against Deschutes County on behalf of S.G. is dismissed.

Next, to support S.G.'s claim of IIED, plaintiff must show the following: (1) defendant intentionally inflicted severe emotional distress on S.G.; (2) defendant's actions caused S.G.'s severe emotional distress; and (3) defendant's actions were "an extraordinary transgression of the bounds of socially tolerable conduct." *McGanty v. Staudenraus*, 321 Or. 532, 543, 901 P.2d 841 (1995) (quoting *Sheets v. Knight*, 308 Or. 220, 236, 779 P.2d 1000 (1989)). Socially intolerable conduct is conduct that is "outrageous in the extreme." *Watte v. Edgar Macyens, Jr., M.D., P.C.*, 112 Or. App. 234, 239, 828 P.2d 476 (1992).

Even assuming that S.G. suffered emotional distress, plaintiff fails to raise a genuine issue of material fact suggesting that defendant's actions were socially intolerable. Deputy Alford merely accompanied Camreta during an investigation of possible sexual abuse of S.G., following the arrest of S.G.'s father for sexually abusing another child. Nothing in his actions remotely suggests "an extraordinary transgression of the bounds of socially tolerable conduct." Accordingly, plaintiff's IIED claim against Deschutes County on behalf of S.G. is dismissed.

CONCLUSION

For the reasons set forth above, defendants' Motions for Summary Judgment (docs. 41, 46, 50) are GRANTED, and defendants Deschutes County and Deputy Sheriff James Alford's Motion to Strike (doc. 87) is DENIED as moot. This case is DISMISSED.

IT IS SO ORDERED.

Dated this 23 day of March, 2006.

/s/ Ann Aiken
Ann Aiken
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor, Plaintiff-Appellant, v. BOB CAMRETA; DESCHUTES COUNTY JAMES ALFORD, Deschutes County Sheriff; BEND LAPINE SCHOOL DISTRICT; TERRY FRIESEN, Defendants-Appellees.	No. 06-35333 D.C. No. CV-05-06047-AA District of Oregon, Eugene ORDER (Filed Mar. 1, 2010)

Before: BERZON and BEA, Circuit Judges, and GUTIERREZ,* District Judge.

The panel has unanimously voted to deny appellee's petition for rehearing. Judge Berzon and Judge Bea have voted to deny the petition for rehearing en banc. Judge Gutierrez recommends denial of the petition for rehearing en banc.

---

* The Honorable Philip Gutierrez, United States District Court for the Central District of California, sitting by designation.

The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the petition for rehearing en banc is rejected.

167

Nos. 09-1454, 09-1478

Supreme Court, U.S.
FILED
AUG 02 2010
OFFICE OF THE CLERK

In The Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

JAMES ALFORD,
Deschutes County Deputy Sheriff,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

On Petition For Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

MIKEL R. MILLER
LAW OFFICE OF MIKEL R. MILLER, PC
26 NW Hawthorne Ave.
Bend, OR 97701
(541) 388-9819
mike@lawofficeofmikelrmiller.com

Counsel for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the fact that students have a reduced right to be free from unreasonable search and seizure by school officials, lead to the conclusion that the students' rights are reduced regardless of who or why they are being searched as long as they are still on the school grounds?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
Facts	1
Procedure	1
MISSTATEMENTS OF FACT	2
REASONS FOR DENYING THE PETITION	3
Not in Conflict with Precedent	4
Not in Conflict with Other Circuits	6
CONCLUSION	7

TABLE OF AUTHORITIES

Page

CASES CITED

Gates v. Texas Dept. of Protective and Regulatory Services, 537 F.3d 404 (5th Cir. 2008) 6, 7

Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009) 6

Illinois v. Lidster, 540 U.S. 419 (2004) 4, 5

New Jersey v. T.L.O., 469 U.S. 325 (1985) 5, 6

CONSTITUTIONAL PROVISIONS AND STATUTES CITED

U.S. Const. amend. IV 1, 4, 5

42 U.S.C. § 1983 1

STATEMENT OF THE CASE

Facts

This case concerns the claims of a Mother, Sarah Greene, and her two daughters, S.G. and K.G. against a state child protective services worker (Camreta) and a deputy sheriff (Alford). At the time of the incidents involved in this matter, S.G. was nine years old. This family became involved with child protective services when Nimrod Greene, Sarah's husband and the father of S.G. and K.G., was accused of touching F.S., a seven-year-old boy, on his private parts, on the outside of his pants. The mother of the boy said that Sarah Greene had commented about being uncomfortable with some interactions between Nimrod and his daughters, and the boy's father said that Nimrod had mentioned that his wife was accusing him of abusing his daughters. Based on these allegations, the state child protective services worker, accompanied by the deputy sheriff, went to S.G.'s school and had school personnel remove her from her classroom. S.G. was placed in a separate room and kept there for two hours while she was questioned by Camreta. The deputy sheriff, Alford, was in the room the whole time but asked few questions.

Procedure

S.G. filed this claim pursuant to the Fourth Amendment and 42 U.S.C. § 1983, claiming that the seizure at the school was unreasonable. The District Court found that S.G. was seized, but that the seizure

was reasonable. The Ninth Circuit panel found that S.G. was seized, and the seizure was unreasonable, but that the actors were entitled to qualified immunity. The Ninth Circuit found that in order for the seizure of S.G. to be reasonable it must be based on either a court order, probable cause and exigent circumstances, or parental consent.

MISSTATEMENTS OF FACT

Respondent believes the following items are misstatements of fact:

a. by Bob Camreta, Case No. 09-1454

1) At the bottom of page 1 of Petitioner's Petition for Writ of Certiorari in his opening statement of reasons for this Court to take review, Camreta claims that obtaining parental consent for an interview of the child is "unfeasible when one of the suspected perpetrators is a parent." To the best of Respondents recollection there is no proof of this assertion in the record.

There was evidence to the contrary before the Court. The only basis for suspecting Nimrod of abusing his daughters was the claim by the parents of the young boy that both Nimrod and Respondent Sarah Greene had made admissions to them – an indication that Sarah Greene was not hiding from the issue.

2) In footnote 1 on page 5, the Petitioner refers to his appeal of the grant of summary judgment to

Respondent. This appears to be a clerical error. The Respondent appealed the grant of Summary Judgment to Petitioners.

b. by Deputy Alford, case No. 09-1478

On page 6 in the statement of facts, Petitioner claims that the young boy F.S. alleged that Nimrod "sexually assaulted" him. This is not an accurate representation of the facts, but is an accurate representation of the assumption made by Camreta and Alford.

The Respondents believe the evidence would show that the young boy first complained that he was mad at Nimrod because he had tied the young boy's shoelaces together. Only after questioning by the child's concerned mother did the child say that Nimrod had touched him on the outside of his pants over his private parts. There was no evidence of any intentional sexual purpose to the contact. After police involvement and additional questioning, the young boy remembered a prior similar incident at some unspecified time in the past. There were insufficient facts to believe that sexual assault had occurred.

REASONS FOR DENYING THE PETITION

The Petitioners urge the Court to believe that the decision by the Ninth Circuit in this case is an aberration and not in line with either precedent of this Court or decisions in other Circuits. Camreta and

Alford ask that this Court deny S.G. the full protection of the Fourth Amendment and that a balancing test be applied. Petitioners argue that because interviewing children at school is such an important investigatory tool, the Court should limit the children's protections against unreasonable search and seizures. Application of a balancing test would not change the outcome of this case.

After examining the extent of the seizure imposed on S.G. and the amount of law enforcement purpose involved, the Court found that S.G. was entitled to the full protection of the Fourth Amendment of the U.S. Constitution. The circumstances of the seizure of the child in this case justify the requirement that the Petitioners have probable cause and exigent circumstances, or obtain a court order or parental consent.

Not in Conflict with Precedent

A. *Illinois v. Lidster*, 540 U.S. 419 (2004)

Alford and Camreta claim the decision in this case (*Greene*) is in conflict with *Illinois v. Lidster*, 540 U.S. 419 (2004). *Lidster* involved law enforcement briefly stopping motor vehicles to ask if perhaps the driver or any passengers had witnessed a hit and run incident that occurred on the same road at the same time of day a few days earlier. Petitioners cite this case for the proposition that when the state is looking for witnesses they are free to use a lesser standard than probable cause for seizing witnesses.

In finding that the stop of individuals in *Lidster* was reasonable, the Court focused on the minimal interference with the liberty interest that the Fourth Amendment was meant to protect. The seizure consisted of a brief wait in line and a few seconds of contact with the police. The Court determined that this stop was only for information-seeking and the questions asked were not designed to elicit self-incriminating information and therefore was not likely to cause anxiety. There was no intent of gathering information that pertained to the person stopped. The circumstances that allowed the Court to find that the stop in *Lidster* was reasonable are not found in this case.

Camreta and Alford went to the school with the specific intent of interviewing S.G. The interview was not brief, was focused specifically on S.G. and her family, and was much more than a minimal interference with her personal liberty. The circumstances in this case clearly would have caused anxiety in a nine-year-old child.

B. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)

Alford and Camreta also each claim that the "special needs" doctrine discussed in *T.L.O.*, which allows school officials to search and seize students on less than probable cause, should be applicable in this case. *T.L.O.* involved a search by a school official who was acting to maintain discipline on the school

grounds. The Court has continuously found that school officials have a "special need" to protect the students that have been entrusted to their care, and as such the school officials may search students and their possessions when they reasonably suspect a threat to the well-being of the school environment or the students themselves.

As the Ninth Circuit found in this case: "The 'special need' animating the Court's decision in *T.L.O.* is therefore entirely absent." *Greene v. Camreta,* 588 F.3d 1011, 1025 (9th Cir. 2009). Camreta and Alford were not interviewing S.G. because of any threat to the school environment. Instead, Camreta and Alford want to claim the same "special need" to seize S.G. as a school officer would have, yet their seizure of S.G. is not at all related to the school environment or student safety.

Not in Conflict with Other Circuits

While the Fifth Circuit does appear to have adopted a different standard for interviewing children at a public school, the application of that rule to this case would result in the same outcome. *Gates v. Texas Dept. of Protective and Regulatory Services*, 537 F.3d 404 (5th Cir. 2008). The Court in *Gates* finds that "seizing a child from a public school is a lesser intrusion into the freedoms the child would otherwise enjoy, as those freedoms have already been limited." (537 F.3d at 432). The Court went on to determine

that a "social worker must have a reasonable belief that the child has been abused and probably will suffer further abuse upon his return home at the end of the school day." (537 F.3d at 433). This is a reduced standard from that found by the Ninth Circuit, but would lead to the same result when applied to the facts of this case.

There were no allegations that S.G. had been abused, only allegations that S.G.'s mother was uncomfortable because she felt some interactions between S.G. and Nimrod were inappropriate, and Nimrod being upset because the mother was upset. With no evidence of abuse or reason to believe the child would be abused if returned home, the seizure would have been unreasonable under even a reduced standard.

CONCLUSION

The Court should deny the Petition for Writs of Certiorari because the Ninth Circuit has correctly stated the law. While school officials may have a "special need" to use only reasonable suspicion to protect the school, a child's right to be free from unreasonable

search and seizure is not lost just because law enforcement is able to seize her on school grounds.

Respectfully submitted,

MIKEL R. MILLER
LAW OFFICE OF MIKEL R. MILLER, PC
26 NW Hawthorne Ave.
Bend, OR 97701
(541) 388-9819
mike@lawofficeofmikelrmiller.com

Counsel for Respondent

Supreme Court, U.S.
FILED
JUL 6 - 2010
OFFICE OF THE CLERK

No. 09-1478

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES ALFORD, Deputy Sheriff,
Petitioner,

v.

SARAH GREENE, et al.
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER, JAMES ALFORD, DEPUTY SHERIFF, DESCHUTES COUNTY, OREGON, BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY

STEVE COOLEY
District Attorney of Los Angeles County
IRENE T. WAKABAYASHI *Counsel of Record*
Head Deputy, Appellate Division
PHYLLIS C. ASAYAMA
Assistant Head Deputy, Appellate Division

Appellate Division
320 West Temple Street, Suite 540
Los Angeles, California 90012
Telephone: (213) 974-5911
Attorneys for Amicus Curiae

TABLE OF CONTENTS

	Pages
AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER, JAMES ALFORD, DEPUTY SHERIFF, DESCHUTES COUNTY, OREGON, BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY	1
INTEREST OF AMICUS CURIAE	2
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THIS COURT MAY CONSIDER AN ISSUE NOT RAISED DIRECTLY BY THE PARTIES BUT RAISED IN AN AMICUS BRIEF	5
II. AN INTERVIEW OF A CHILD AT A PUBLIC SCHOOL REGARDING SUSPECTED ABUSE IS NOT A "SEIZURE" PER SE UNDER THE FOURTH AMENDMENT BECAUSE OBJECTIVELY WHEN A POLICE OFFICER QUESTIONS A CHILD WHO IS A SUSPECTED VICTIM, NOT A SUSPECT HERSELF, THERE IS NOTHING TO CONVEY THAT THE CHILD IS NOT FREE TO LEAVE OR MOVE OR IGNORE THE QUESTIONS	6
CONCLUSION	12

TABLE OF AUTHORITIES

Pages

CASES

California v. Hodari D.
499 U.S. 621 (1991) 8

Florida v. Bostick
501 U.S. 429 (1991) 8-10

Florida v. Rodriguez
469 U.S. 1 (1984) 7

Florida v. Royer
460 U.S. 491 (1983) 7

Greene v. Camreta
588 F.3d 1011 (9th Cir. 2009) 3, 10, 11

INS v. Delgado
466 U.S. 210 (1984) 8-10

Michigan v. Chestemut
486 U.S. 567 (1988) 8

Teague v. Lane
489 U.S. 288 (1989) 5

Terry v. Ohio
392 U.S. 1 (1968) 6, 8, 11

United States v. Mendenhall
446 U.S. 544 (1980) 7

STATUTORY AUTHORITY

California Penal Code section 11174.3 1

OTHER AUTHORITIES

Los Angeles County Charter section 25 1

The State of Child Abuse in Los Angeles County by Inter-Agency Council on Child Abuse and Neglect (ICAN) 2

Los Angeles County Child Abuse and Neglect Protocal by Los Angeles County Inter-Agency Council on Child Abuse and Neglect (ICAN) 3

CALIFORNIA GOVERNMENT CODE

Section 26500 2

No. 09-1478

In The
SUPREME COURT OF THE UNITED STATES

JAMES ALFORD, Deputy Sheriff,
Deschutes County, Oregon,
Petitioner,

v.

SARAH GREENE, et al.
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER, JAMES ALFORD, DEPUTY SHERIFF, DESCHUTES COUNTY, OREGON, BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY

Amicus curiae, Steve Cooley, District Attorney for the County of Los Angeles, State of California, submits this brief for filing in support of the petition for a writ of certiorari to review the judgment of the United States Court of Appeal for the Ninth Circuit as the authorized law officer of the county, pursuant to Supreme Court Rules 37.2(a) and 37.4.[1]

---

1. Los Angeles County Charter section 25 (1995) states:

> Each County officer, Board or Commission shall have the powers and perform the duties now or hereafter prescribed by general law, and by this charter as to such officer, Board of Commission.

(continued...)

INTEREST OF AMICUS CURIAE

Amicus curiae, as the executive officer charged with the prosecution of crime in the most populous county in California, has a compelling interest in protecting children and ensuring their safety and in the prompt and effective investigation and prosecution of suspected child abuse.

Los Angeles County governmental agencies conduct a large number of child abuse and neglect investigations. *The State of Child Abuse in Los Angeles County*, prepared by the Los Angeles County's Inter-Agency Council on Child Abuse and Neglect (ICAN), reported the following data for 2008.[2] The Department of Child and Family Services received 166,745 referrals of child abuse or neglect, including 52,242 referrals for sexual and physical abuse and severe neglect. ICAN Report at 161. Law enforcement agencies conducted over 35,000 investigations.[3] Prosecutors filed over 3,400 cases. *Id* at 283.

(...continued)

(Footnote omitted.) It is provided in the California general law that:

> The district attorney is the general prosecutor, except as otherwise provided by law. The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for the public offenses.

Cal. Gov't Code § 26500 (West 1998).

2. Los Angeles County Inter-Agency Council on Child Abuse and Neglect, *The State of Child Abuse in Los Angeles County* (April 2010) <http://ican.co.la.ca.us/dataD loads.htm (ICAN report).

3. The Los Angeles County Sheriff's Department had 3,170 cases reported by station. ICAN Report at 389. The Juvenile Division of the Los Angeles Police Department conducted 27,454 investigations (criminal and non-criminal). *Id.* at 39. Other independent police agencies reported a total of 5,437 investigations. *Id* at 54-55. The other nine city attorneys' offices in Los Angeles county did not report referral and filing statistics.

In Los Angeles County, coordination of child abuse investigations and interviews of child victims are encouraged.[4] A significant number of these investigations include interviews of suspected victims in their schools, particularly if the suspected abuser is a household member. California law specifically allows police investigators and government social workers who are investigating child abuse and neglect to conduct these interviews at school. Cal. Penal Code § 11174.3 (Deering 2010).

The Ninth Circuit held in *Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009), that a government official must have a warrant, court order, parental consent, or exigent circumstances before "seizing" a child at public school to conduct an interview regarding suspected abuse. The Ninth Circuit's per se holding that all public school interviews of children regarding suspected abuse are "seizures" within the meaning of the Fourth Amendment is a gross mischaracterization with very serious consequences. Requiring a warrant, court order, parental consent, or exigent circumstances before any child may be interviewed at school regarding suspected abuse, hampers the efforts of law enforcement officers and prosecutors to promptly and effectively investigate and prosecute child abuse and most importantly, the efforts to protect children and ensure their

4. Los Angeles County Inter Agency Council on Child Abuse and Neglect, *Los Angeles County Child Abuse and Neglect Protocol* (August 2009) <http://www.ican4kids.org/documents/LACounty_Child_Abuse_and_Neglect_Protocol.pdf> (ICAN Protocol). The ICAN Protocol serves as a guide to the recommended practices for the identification, reporting, investigation, case management and prosecution of child abuse and neglect cases, including a preference for coordinating efforts so that providers will "lessen emotional trauma to the victims occasioned by repeat interviews ... and other governmental interventions" and "promote inter-agency investigation and case management." ICAN Protocol at vii, 1. Specific recommendations include a multi-disciplinary approach and coordinated interviews. *Id.* at 9, 34.

safety. It is therefore in the interest of amicus to urge that certiorari be granted.

SUMMARY OF ARGUMENT

Clearly, not every encounter with a police officer triggers the Fourth Amendment. Generally, only if the encounter could be described as a "seizure" or a "search" is the Fourth Amendment implicated. An encounter with the police that is not a seizure is generally referred to as a "consensual encounter." The importance of such an encounter is that it does not need to be justified under the Fourth Amendment. Whether a seizure has taken place is to be determined by an objective test, which asks not whether the person involved in the police encounter perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person.

Amicus asserts herein that an interview of a child at a public school conducted to determine whether that child is a victim of child abuse or sexual molestation is not a seizure because when an officer questions a child about the child's possible victimization, objectively there is nothing per se to suggest that the child would not be free to leave, free to move, or free to simply ignore the questions.

The fact that, in the interests of privacy, a child is moved from a classroom to a school office for the interview makes no difference: children are directed to move from place to place at school all day every day, making the interview no more intrusive than the child's daily experience at school.

The fact that the officer involved is armed is also of no consequence: it is common knowledge that officers carry weapons as part of their uniform; upon seeing a gun in an officer's holster, it is not objectively reasonable for a crime victim to believe that the police officer would pull it out and shoot her if she ignored questions regarding her victimization.

The fact that the interview lasts an hour, even two, is also insignificant: there is an art to interviewing crime victims, particularly child victims, which involves taking the time necessary to make the child comfortable by asking safe questions and getting to know the child before asking about the suspected abuse or molestation. These factors do not transform a consensual encounter into a seizure of the victim that implicates the Fourth Amendment.

ARGUMENT

I. THIS COURT MAY CONSIDER AN ISSUE NOT RAISED DIRECTLY BY THE PARTIES BUT RAISED IN AN AMICUS BRIEF

In this case, the Ninth Circuit agreed, without providing any analysis whatsoever, with the district court that an in-school interview of a child victim regarding suspected abuse was a seizure. None of the parties have thus far directly contested this issue.

In general, only those issues raised by the parties or fairly included in such issues will be considered by the Supreme Court. Sup. Ct. R. 14(1)(a). However, this Court need not always strictly adhere to this rule. Indeed, this Court may consider an issue not raised directly by the parties but raised in an amicus brief. *See Teague v. Lane*, 489 U.S. 288, 300 (1989).

Accordingly, amicus urges this Court to address the issue of whether an in-school interview of a child victim regarding suspected abuse is necessarily a seizure. Amicus asserts that the issue is fairly included, though not directly raised, in the issues stated by the parties. Moreover, even if this Court finds that the issue was not fairly included within those issues raised by the parties, it has been raised by an amicus. *Teague, supra*, 489 U.S. at 300.

II. AN INTERVIEW OF A CHILD AT A PUBLIC SCHOOL REGARDING SUSPECTED ABUSE IS NOT A "SEIZURE" PER SE UNDER THE FOURTH AMENDMENT BECAUSE OBJECTIVELY WHEN A POLICE OFFICER QUESTIONS A CHILD WHO IS A SUSPECTED *VICTIM*, NOT A SUSPECT HERSELF, THERE IS NOTHING WHICH AUTOMATICALLY CONVEYS THAT THE CHILD IS NOT FREE TO LEAVE OR MOVE OR IGNORE THE QUESTIONS

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. Const. amend. IV.

This Court has examined, in various contexts ranging from the city street, to airports, to the workplace, to buses, and to the country's borders, the question of whether police questioning amounts to a "seizure" prohibited by the Fourth Amendment. In a long line of cases, beginning with *Terry v. Ohio*, 392 U.S. 1 (1968), this Court has held multiple times that police questioning itself is not a seizure.

Specifically, in *Terry*, this Court held that a police officer may walk up to anyone on the street and ask a question without running afoul of the Fourth Amendment. *Terry*, 392 U.S. at 22-23. This Court recognized in dictum that "not all personal intercourse between policemen and citizens involves 'seizures' of persons and only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Id.* at 19, fn.16.

Years later, Justice Stewart proposed a similar standard: that a person has been seized "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). In that case, this Court held that no seizure of the respondent had occurred when police agents had approached her on a public concourse of an airport, asked her if she would show them her ticket and identification, and posed a few questions to her. *Id.* at 555.

Two other cases regarding the constitutionality of police questioning at the airport soon followed. In *Florida v. Royer*, 460 U.S. 491 (1983) (plurality opinion), this Court held that respondent, a nervous young man who paid cash for an airline ticket from Miami to New York under an assumed name and carried heavy suitcases, could be stopped by police and temporarily detained while the police investigated whether he was a drug courier. *Id.* at 494. A seizure only occurred once the officers had asked him to accompany them to a small room, retained his ticket and identification, and indicated that he was not free to leave. *Id.* at 504. However, in so holding, this Court still recognized that mere police questioning does not constitute a seizure, explaining that "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if he is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answer to such questions." *Id.*

In *Florida v. Rodriguez*, 469 U.S. 1, 4-6 (1984) (per curiam), this Court held that when an officer, asking respondent in an airport lobby if they might talk and suggesting that they move 15 feet away in order to talk, was not conduct that rose to the level of a seizure. The Court stated it was "the sort of consensual encounter that implicate[d] no Fourth Amendment interests." *Id.*

This Court also held that no seizure occurred when INS agents seeking to identify illegal aliens conducted work force surveys inside a garment factory; while some agents were positioned at exits, others systematically moved through the factory and questioned employees. *INS v. Delgado*, 466 U.S. 210, 220-221 (1984). This Court specifically rejected the argument that the blocked exits turned the incident into a seizure, stating instead that since respondents were free to go about their own business in the workplace after a question was put to them, respondents were not in fact detained. *Id.* at 220.

This Court later ruled in *Michigan v. Chestermut*, 486 U.S. 567, 575 (1988), that no seizure occurred when police officers in a squad car drove alongside a suspect who turned and ran down the sidewalk when he saw the squad car approach. Under the circumstances (no siren, flashing lights, displaying of a weapon, or blocking of the suspect's path), the Court concluded that the police conduct "would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon his freedom of movement." *Id.*

In *California v. Hodari D.*, 499 U.S. 621, 629 (1991), this Court held that an actual chase did not amount to a seizure because the suspect failed to comply with the officer's order to stop. This Court held that a Fourth Amendment "seizure" of a person is the same as a common law arrest and that there must be either application of physical force (or the laying on of hands) or submission to the assertion of authority in order to constitute a seizure. *Id.* at 626, fn. 2.

In *Florida v. Bostick*, 501 U.S. 429, 431-432 (1991), police officers, conducting a "bus sweep" aimed at detecting illegal drugs and their couriers, boarded a bus to inspect tickets and identification of selected passengers. This Court began its analysis with the observation that since *Terry*, it had repeatedly held that mere police questioning was not a seizure. *Id.* at 434. This Court then explained that the mere fact that Bostick did not feel free to leave the bus did not

mean that the police had seized him, he was a passenger on a bus that was soon to depart, such that his movements were "confined" regardless of the conduct of the police officers. *Id.* at 435-436. The Court asserted that the case was "analytically indistinguishable from *Delgado*. Like the workers in that case [subjected to the INS "survey" at their workplace], Bostick's freedom of movement was restricted by a factor independent of police conduct – i.e, by his being a passenger on a bus." *Id* at 436. Accordingly, this Court held that the appropriate inquiry in determining whether a seizure had occurred was "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Id.*

Relying upon the principles pronounced by this Court in these cases in which this Court has stated time after time that mere police questioning is not seizure, Amicus asserts that an interview of a child at a public school by a police officer regarding suspected child abuse is not a seizure per se and that a seizure did not occur in the case at bar.

The fact that in order to conduct the interview, a child may be moved from the classroom to another room at the school, which occurred in this case, does not turn the encounter into a seizure. When a child is at school, he or she[5] is not free to leave. When a child is at school, her movements are already seriously restricted. A child at school goes where teachers and administrators tell her to go and does not go where she is told not to go. Every single day in this country, children are called from their classrooms and told to go the principal's office, a counselor's office, the nurse's office, or to another classroom. There could be any number of reasons to do so; to chastise the child for bad behavior, to praise her for a good deed, to check for head lice, or to place her with a peer group with similar math skills. The point is that the movement from one room within

5. For convenience, as Respondent is a female, female pronouns in reference to the victim will be used henceforth.

the school to another is not a seizure. Like the workers in *Delgado* and the man on the bus in *Bostick*, a child's freedom of movement is seriously impacted at school in ways that are independent of any kind of police conduct: on the one hand, a child must go where she is told regardless of police presence; on the other hand, irrespective of police presence, a child must stay where she is told. Consequently, the fact that a child is moved from one room to another in order to effect an interview does not turn an in-school interview of a child into a seizure: the movement is no more restrictive or intrusive than what a child may experience at school every day.

The Ninth Circuit in this matter placed particular emphasis on the fact that the sheriff was armed. *Greene v. Camreta*, 588 F.3d at 1027-1028. Amicus asserts that this fact does not turn an in-school interview of a child regarding suspected abuse into a seizure. When an adult suspect is detained on the streets by an armed police officer, the belief is not unreasonable that if that person is uncooperative, he runs the risk of being shot. However, when a child, who is suspected not of having perpetrated a crime but of being the *victim* of a crime, sits down to be interviewed by a police officer, it is patently absurd to believe that if the child does not cooperate, the officer will shoot her. It is common knowledge that police officers carry firearms; children routinely see armed officers on television, guarding banks, guarding airports. A reasonable person would not believe that an officer would shoot her, a victim, for refusing to answer questions: the likeliest source of stress for a child in this type of scenario is the desire to still protect the abuser, particularly if that person is a family or household member. In the matter *sub judice*, the child victim specifically stated that she was not particularly distressed by the sheriff's presence: she testified that she is generally comfortable around police officers, that Alford was nice to her and did not do anything to scare her, and that she trusted him. *Id.* at 1017.

The fact that nothing actually happens during an interview to prevent a child from leaving also demonstrates

that it is not a seizure. If a child says "I want my mommy," she stands up to leave, the sheriff blocks the door or tells her "Stop" or "Sit down," and the child does not leave, then a seizure may occur. However, in *Greene*, the child did not ask to call home, did not ask to have Friesen or her parents with her, and did not cry. *Greene v. Camreta*, 588 F.3d at 1017. Indeed, the record is devoid of any facts which objectively show that anything occurred to actually prevent the victim in *Greene* from leaving.

Another important factor is that a victim interview to investigate suspected child abuse is to benefit the child, not to prosecute her. Questioning victims and witnesses to help solve and prevent crime is not the same as questioning a suspect and should not be treated the same for Fourth Amendment purposes.

Finally, the length of an in-school interview cannot be ignored. The amicus recognizes that the type of police questioning approved in *Terry* lasted only minutes. There is clearly a time continuum of a police detention, ranging from minutes to hours, for which a seizure under the Fourth Amendment still may not occur; the length of time is not determinative. Child interviews take time. They should not be rushed. Any experienced interviewer does not go straight to asking the child questions about the suspected abuse but instead first spend time talking about more comfortable subject matters in order to both get to know the child and gain her trust. Viewed in that context, an hour, even two, does not turn the event into a seizure. An interview that keeps a child at school past the end of the regular school day may be problematic, but an interview conducted during the regular school day is not a seizure. In this case *sub judice*, the interview lasted anywhere from one to two hours during which nothing unusual occurred. *Greene v. Camreta*, 588 F.3d at 1017.

The protections of the Fourth Amendment were intended to protect citizens against state officers who were raiding the homes of colonials in search of smuggled goods,

not to prevent police officers from interviewing child victims of suspected abuse in order to help capture the suspect and protect the child. In accepting the notion that an interview of a child at school by a police officer is a seizure per se, the Ninth Circuit engaged in a gross mischaracterization. It is of great nation-wide importance that this Court review the Ninth Circuit's decision and consider this specific issue in its analysis.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari to review the Ninth Circuit's ruling in this matter.

Respectfully submitted,

STEVE COOLEY
District Attorney of
Los Angeles County

By

IRENE WAKABAYASHI, SBN 132848
Head Deputy
Counsel of Record

PHYLLIS C. ASAYAMA, SBN 88919
Deputy District Attorney

Attorneys for Amicus Curiae in Support
of Petitioner for Writ of Certiorari

7 5

Nos. 09-1454 and 09-1478

Supreme Court, U.S.
FILED
DEC 9 - 2010
CLERK

In the Supreme Court of the United States

BOB CAMRETA, Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor, Respondent.

JAMES ALFORD, Deschutes County Deputy Sheriff, Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor, Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

JOHN R. KROGER
Attorney General of Oregon
*MARY H. WILLIAMS
Solicitor General
ANNA JOYCE
Deputy Solicitor General
1162 Court Street
Salem, Oregon 97301-4096
Phone: (503) 378-4402
mary.williams@doj.state.or.us
Counsel for Petitioner
Bob Camreta

*CAROLYN A. KUBITSCHEK
Lansner Kubitschek Schaffer
325 Broadway, Suite 201
New York, NY 10007
Phone: (212) 349-0900
Ckubitschek@Lanskub.com
Counsel for Respondent

*CHRISTOPHER D. BELL
Assistant Legal Counsel
STEVEN E. GRIFFIN
Assistant Legal Counsel
Office of Deschutes County
Legal Counsel
1300 NW Wall Street, Ste 205
Bend, Oregon 97701
Phone: (541) 388-6624
christopher_bell@co.deschutes.or.us
Counsel for Petitioner
James Alford

*Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

PETITION FOR CERTIORARI FILED May 27, 2010
CERTIORARI GRANTED October 12, 2010

2186
77

TABLE OF CONTENTS

Relevant district court docket entries ..... J. A. 1

Relevant Court of Appeals docket entries ..... J. A. 8

Complaint ..... J. A. 12

Judgment ..... J. A. 32

Motion to Join Rehearing Petition ..... J. A. 33

Order ..... J. A. 35

Excerpts from Alford Deposition ..... J. A. 36

Excerpts from Sarah Greene Deposition ..... J. A. 41

Excerpts from Sarah Greene Deposition Vol. II ..... J. A. 46

Excerpts from S.G. Deposition ..... J. A. 53

Affidavit of Sarah Greene ..... J. A. 62

Affidavit of S.G. ..... J. A. 69

NOTICE

The following items are not contained in the joint appendix because they appear in the appendix to the certiorari petitions in either *Camreta v. Greene*, 09-1454 or *Alford v. Greene*, 09-1478.

Ninth Circuit Opinion ..... App. 1

District Court Order and Opinion ..... App. 55

Order Denying Petition for Rehearing En Banc ..... App. 76

Petition for Panel Rehearing with Suggestion for Rehearing En Banc ..... App. 78

U.S. District Court
District of Oregon (Eugene)
CIVIL DOCKET FOR CASE #: 6:05-cv-06047-AA

Greene v. Camreta et al
Assigned to: Chief Judge Ann L. Aiken
Case in other court: Ninth Circuit, 06-35333
Cause: 42:1983 Civil Rights Act

Date Filed: 02/24/2005
Jury Demand: Defendant
Nature of Suit: 440 Civil Rights: Other
Jurisdiction: Federal Question

Date Filed	#	Docket Text
02/24/2005	1	Complaint (Civil Rights – 4th Amendment, 14th Amendment, 42 USC 1983) Jury Trial Requested) Filing Fee in amount of $250.00 collected. Receipt No. 600000249 issued. Filed by Sarah Greene against Friesen Terry, Bob Camreta, Deschutes County Sheriff James Alford, Deschutes County, Bob Smit, The Kids Center, Bend Lapine School District. (Cp,) (Entered: 02/24/2005)
05/04/2005	4	Answer to Complaint *and Affirmative Defenses*. Filed by Deschutes County Sheriff James Alford, Deschutes County. (Amberg, Mark) (Entered: 05/04/2005)
10/13/2005	35	Judgment of Dismissal: Plaintiff's claims asserted under 42 USC 1983 against Defendant Bob Smit

		and Defendant the Kids Center in the above-entitled action be and the same hereby are dismissed with prejudice and Defendant Bob Smit and Defendant the Kids Center are awarded their costs in the amount of $389.28. Signed on October 12, 2005 by Judge Ann L. Aiken. (cp,) (Entered: 10/13/2005)
11/23/2005	41	Motion for Summary Judgment. Filed by Bob Camreta. (Kramer, David) (Entered: 11/23/2005)
11/23/2005	42	Concise Statement of Material Fact, *on Behalf of Defendant Bob Camreta*. Filed by Bob Camreta. (Related document(s): Motion for Summary Judgment 41.) (Kramer, David) (Entered: 11/23/2005)
11/23/2005	43	Affidavit of David L. Kramer in Support of Motion *for Summary Judgment*. Filed by Bob Camreta. (Related document(s): Motion for Summary Judgment 41.) (Attachments: #1 #2 #3)(Kramer, David) (Entered: 11/23/2005)
11/23/2005	44	Affidavit of Bob Camreta in Support of Motion *for Summary Judgment*. Filed by Bob Camreta. (Related document(s): Motion for Summary Judgment 41.) (Attachments: #1 #2 #3 #4 #5 #6 #7 #8 #9 #10 #11 #12 #13)(Kramer, David (Entered: 11/23/2005)

11/23/2005	45	Memorandum in Support *of Defendant Camreta's Motion for Summary Judgment*. Filed by Bob Camreta. (Related document(s): Motion for Summary Judgment 41.)(Kramer, David) (Entered: 11/23/2005)
11/23/2005	46	Motion for Summary Judgment. Filed by Deschutes County Sheriff James Alford, Deschutes County. (Amberg, Mark) (Entered: 11/23/2005)
11/23/2005	47	Memorandum in Support *of Motion for Summary Judgment*. Filed by Deschutes County Sheriff James Alford, Deschutes County. (Related document(s): Motion for Summary Judgment 46.)(Amberg, Mark) (Entered: 11/23/2005)
11/23/2005	48	Concise Statement of Material Fact. Filed by Deschutes County Sheriff James Alford, Deschutes County. (Related document(s): Motion for Summary Judgment 46.)(Amberg, Mark) (Entered: 11/23/2005)
11/23/2005	49	Affidavit of Christopher Bell in Support of Motion. Filed by Deschutes County Sheriff James Alford, Deschutes County. (Related document(s): Motion for Summary Judgment 46.) (Attachments: #1 Exhibit Deposition

		pages)(Amberg, Mark) (Entered: 11/23/2005)
11/25/2005	53	Affidavit of Kari A. Furnanz *(Confidential Exhibits to be Filed Separately Under Seal)*. Filed by Friesen Terry, Bend Lapine School District. (Related document(s): Motion for Summary Judgment 50)(Furnanz, Kari) (Entered: 11/25/2005)
11/28/2005	54	Exhibits in support of Affidavit 53 (FILED UNDER SEAL). Filed by Bend Lapine School District.) (cp,) (Entered: 11/29/2005)
01/05/2006	64	Affidavit of Sarah Greene *in Opposition to Defendants' Motions for Summary Judgment*. Filed by all plaintiffs. (Miller, Mikel) (Entered: 01/05/2006)
01/05/2006	65	Affidavit of SG *in Opposition to Defendants' Motions for Summary Judgment*. Filed by all plaintiffs. (Miller, Mikel) (Entered: 01/05/2006)
01/11/2006	72	Reply to Motion for Summary Judgment 50, Motion for Summary Judgment 41, Motion for Summary Judgment 46. Filed by all plaintiffs.(Miller, Mikel) (Entered: 01/11/2006)
01/11/2006	73	Concise Statement of Material Fact. Filed by all plaintiffs. (Related document(s): Motion for

		summary Judgment 41, Motion for Summary Judgment 50, Motion for Summary Judgment 46.)(Miller, Mikel) (Entered: 01/11/2006)
01/11/2006	74	Affidavit of Mikel R. Miller *in Support of Opposition to Defendants' Motions for Summary Judgment*. Filed by all plaintiffs. (Related document(s): Reply to Motion 72.) (Attachments: #1 Exhibit Defendant James Alford's deposition, pages 7, 10, 11, 15 and 20# 2 Exhibit Detective Merlin Toney's report# 3 Exhibit Oregon Interviewing Guidelines)(Miller, Mikel) (Entered: 01/11/2006)
01/11/2006	75	Response to Concise Statement of Material Facts regarding Motion for Summary Judgment 41, Motion for Summary Judgment 50, Motion for Summary Judgment 46. Filed by all plaintiffs.(Miller, Mikel) (Entered: 01/11/2006)
01/11/2006	76	Response to Concise Statement of Material Facts regardng Motion for Summary Judgment 41, Motion for Summary Judgment 50, Motion for Summary Judgment 46 *from Defendant Alford*. Filed by all plaintiffs.(Miller, Mikel) (Entered: 01/11/2006)

01/11/2006	77	Response to Concise Statement of Material Facts regarding Motion for Summery Judgment 41, Motion for Summary Judgment 50, Motion for Summary Judgment 46 *from Defendant Friesen*. Filed by all plaintiffs. (Miller, Mikel) (Entered: 01/11/2006)
01/19/2006	78	Reply *Memorandum in Support of Motion for Summary Judgment*. Filed by Bob Camreta. (Related document(s): Motion for Summary Judgment 41.) (Kramer, David (Entered: 01/19/2006)
01/19/2006	79	Affidavit of David L. Kramer. Filed by Bob Camreta. (Related document(s): Reply 78.)(Kramer, David) (Entered: 01/19/2006)
01/24/2006	85	Reply to *Plaintiffs' Opposition* to Motion for Summary Judgment 46. Filed by Deschutes County Sheriff James Alford, Deschutes County. (Amberg, Mark) (Entered: 01/24/2006)
01/24/2006	86	Response to Concise Statement of Material Facts regarding Motion for Summary Judgment 46. Filed by Deschutes County Sheriff James Alford, Deschutes County. (Amberg, Mark) (Entered: 01/24/2006)
01/24/2006	88	Memorandum in Support *of Objections to Plaintiffs' Concise State-*

		ment of Material Facts and Opposition to Motion for Summary Judgment. Filed by Deschutes County Sheriff James Alford, Deschutes County. (Related document(s): Motion to Strike 87.)(Amberg, Mark) (Entered: 01/24/2006)
03/24/2006	89	**ORDER:** Defendants' Motions for Summary Judgment 41, 46, 50 are granted, and defendants Deschutes County and Deputy Sheriff James Alford's Motion to Strike 87 is Denied. This case is dismissed. Signed on March 23, 2006 by Judge Ann L. Aiken. (cp,) (Entered: 03/24/2006)
03/24/2006	90	Judgment: This action is dismissed. Signed March 24, 2006 by deputy Clerk, C. Pew. (cp,) (Entered: 03/24/2006)
04/19/2006	103	Notice of Appeal to the 9th Circuit. Filed by all plaintiffs. (Miller, Mikel) (Entered: 04/19/2006)

General Docket
United States Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 06-35333 **Docketed:** 04/27/2006 **Nature of Suit:** 3440 Other Civil Rights **Termed:** 12/10/2009 Greene v. Camreta, et al **Appeal From:** U.S. District Court for Oregon, Eugene **Fee Status:** Paid		
Case Type Information: 1) civil 2) private 3) null		
Originating Court Information: **District:** 0979-6 : CV-05-06047-AA **Trial Judge:** Ann L. Aiken, Chief District Judge **Date Filed:** 02/24/2005 **Date Order/Judgment:** 03/24/2006 **Date NOA Filed:** 04/19/2006		
Prior Cases: None **Current Cases:** None		
04/27/2006	1	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): n. setting schedule as follows: appellee's designation of RT is due 5/9/06,,; appellant shall order

		transcript by 5/19/06; court reporter shall file transcript in DC by 6/19/06; certificate of record shall be filed by 6/26/06 ; appellant's opening brief is due 8/7/06; appellees' brief is due 9/5/06,, ; appellants' reply brief is due 9/18/06; [06-35333] (GR)
09/08/2006	18	Filed original & 15 copies Appellant Sarah Greene opening brief (Informal: n) 23 pages; 5 Excs.; served on 9/6/06 [06-35333] (GV)
11/13/2006	27	Filed original and 15 copies aples Bob Camreta, Deschutes County, James Alford, Bend Lapine SD, Terry Friesen's 43 pages brief, 1 Exc. vols: ; served on 11/9/06 [06- 35333] (CW)
11/24/2006	30	Filed original and 15 copies appellee Bob Camreta's 26 pages brief, ; served on 11/20/06 [06-35333] (CW)
12/27/2006	32	Filed original & 15 copies Sarah Greene reply brief (Informal: n) 10 pages; served on 12/22/06 [06-35333] (GV)
01/17/2007	36	FILED CERTIFIED RECORD ON APPEAL: 1 CLERK'S RECORD & 1

		SEALED DOCUMENT #54. [06-35333] (SD)
03/06/2008	43	ARGUED AND SUBMITTED TO MARSHA S. BERZON, CARLOS T. BEA and PHILIP S. GUTIERREZ. (EU)
12/10/2009	48	FILED OPNION (MARSHA S. BERZON, CARLOS T. BEA and PHILIP S. GUTIERREZ) AFFIRMED IN PART, REVERSED IN PART AND REMANDED. Judge: MSB Authoring. FILED AND ENTERED JUDGMENT. [7158449] (RP)
02/04/2010	54	Filed (ECF) Appellee Bob Camreta petition for rehearing en banc (from 12/10/2009 opinion). Date of service: 02/04/2010. [7220586] (DBT)
02/04/2010	55	Filed (ECF) Appellee James Alford Motion to join in Petition for Rehearing filed on 02/04/2010. Date of service: 02/04/2010. [7220654] —[COURT UPDATE: Corrected docket text to reflect content of filing, resent NDA, 02/05/2010 by AWM] (SG)

02/16/2010	59	Filed order (MARSHA S. BERZON, CARLOS T. BEA and PHILIP S. GUTIERREZ) Appellee James Alford's motion to join Appellee Bob Camreta's petition for rehearing, with suggestion of rehearing en banc, is granted. The California State Association of Counties' motion for leave to file an amicus brief is granted. [7231986] (KKW)
03/01/2010	65	Filed order (MARSHA S. BERZON, CADRLOS T. BEA and PHILIP S. GUITEIRREZ) The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing is denied and the petition for rehearing en banc is rejected. [7247340] (BJB)
03/09/2010	66	MANDATE ISSUED.(MSB, CTB and PSG) [7257313] (SW)

Mikel R. Miller
OSB #91475
E-Mail: mike@lawofficeofmikelmiller.com
Law Office of Mikel R. Miller, P.C.
26 N.W. Hawthorne
Bend, OR 97701
Telephone: (541) 388-9819
Fax: (541) 317-4987
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

SARAH GREENE, personally and as next friend for S. G. a minor and K. G. a minor, Plaintiffs v BOB CAMRETA, DESCHUTES COUNTY DEPUTY SHERIFF JAMES ALFORD, DESCHUTES COUNTY, JANE DOE, BOB SMIT, THE KIDS CENTER, THE BEND LAPINE SCHOOL DISTRICT and TERRY FRIESEN, Defendants.	Case No.: COMPLAINT Civil Rights 4th Amendment 14th Amendment 42 USC § 1983 JURY TRIAL REQUESTED

Plaintiffs, by and through their attorney of record Mikel R. Miller, hereby allege as follows:

JURISDICTIONAL STATEMENT

Plaintiffs' are seeking relief under the U.S. Constitution, 4th and 14th Amendments and 42 USC § 1983 and § 1988, with ancillary State claims. This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1331 and § 1343 (3).

1.

PARTIES

Plaintiff Sarah Greene is the natural mother of S. G. a minor, and K. G. a minor, all residents of Bend, Oregon. Sarah Greene brings this action on behalf of herself and as next friend for S.G. and K.G.

2.

Bob Camreta, (hereinafter referred to as Camreta) at all times relevant to this action, was an employee of the State of Oregon working for the Department of Human Services, Child Protective Services, (hereinafter referred to as DHS) and is being sued in his individual capacity.

3.

Deputy James Alford, (hereinafter referred to as Alford) was an employee of the Deschutes County Sheriff's Office at all times relevant to this action, and is being sued in his individual and official capacity.

4.

Deschutes County Sheriff's Office is a division of the Deschutes County Government. Deschutes

County is a local government entity located in the State of Oregon.

5.

Jane Doe is an unknown employee of The KIDS INTERVENTION & DIAGNOSTIC SERVICE CENTER (hereinafter referred to as the Center). Bob Smit is the executive director of the Center and personally makes policy and procedure decisions for the Center. The Center is a non profit corporation organized under the laws of the State of Oregon. The Center appears to be a regional assessment center formed pursuant to ORS 418.780 to ORS 418.796. The Center works closely in joint action with local law enforcement agencies (hereinafter referred to as LEA), which include the Deschutes County Sheriffs Office, Camreta and Alford. The Center conducts forensic examinations of children whom are alleged victims of abuse, for LEA and DHS.

6.

The Bend LaPine School District is a local government entity organized pursuant to the statutes of the State of Oregon, and in control of Elk Meadow Elementary school located in Bend, Oregon. Terry Friesen (hereinafter referred to as Friesen) is an employee of the Bend LaPine School District, working at Elk Meadow Elementary School, and is being sued in her official capacity.

FACTS

1.

Prior to February 10, 2003, Nimrod Greene lived with his wife Sarah and their two daughters, S.G., born 1993 and K.G., born 1997. Mr. Greene was a tile mason employed by Franklin Smith, Jr.

2.

On February 10, 2003, Mr. Greene was drinking alcoholic beverages with Mr. Smith at Mr. Smith's residence. After Mr. Greene left his employer's residence, the employer's son, F.S., born 1995, made a statement that he was mad at Mr. Greene because Mr. Greene had tied his shoe laces together. After questioning by the father, F.S. said that Mr. Greene had touched his private parts on the outside of his pants.

3.

Mr. Green was arrested on February 12, 2003 for sexually abusing F.S. Mr. Greene was released on bail the same day after Sarah Greene posted security in the amount of $10,000.00.

4.

On February 24, 2003, Camreta and Alford, went to Elk Meadow Elementary School, located in Bend, Oregon, where S.G. was attending the fourth grade. They informed the personnel at the school they wanted to speak to S.G. Camreta and Alford did not have a warrant, court order, probable cause, or consent of a parent or the child to seize S.G.

5.

Friesen, following the custom and policy of the Bend LaPine School District, went to S.G.'s classroom and seized custody of S.G., removed her from her classroom and transferred her custody to Camreta and Alford. Friesen did not have a warrant, court order, probable cause or consent of a parent or the child. Frieson should have known she did not have authorization to remove S.G. from her class for a non-school purpose. Frieson should have foreseen the emotional trauma and injury her actions would cause S.G. As a result of Frieson's actions Plaintiff S.G. has lost her belief that the school was a safe place and that she could trust the teachers.

6.

The Bend LaPine School District has a custom and policy of unreasonably seizing children for non-school purposes, without a warrant, court order, probable cause or consent of a parent or the child. The school knew that the parents had not consented to this action nor had the parents knowingly authorized the school to consent on behalf of the parent or child.

7.

Camreta and Alford then conducted a custodial interrogation of S.G., for over one (1) hour. They did not contact her parents or seek a court order before conducting the interrogation. They did not allow her to leave the room or contact her parents. This action was an unreasonable seizure and search.

8.

Camreta and Alford conducted the interrogation of S.G. in an incompetent manner designed to elicit false accusations; they asked leading questions; they repeatedly asked S.G. the same questions; they continuously rejected the child's answers if the answers were not what Defendants wanted to hear; they would not let the child leave the room until the child made a statement that they could interpret as a crime committed by the father; and they knowingly failed to preserve a record of the initial interview. Defendants did not comply with any minimally acceptable technique for interviewing children about abuse. Defendants claim that S.G. admitted her Dad touched her in a bad way on her chest and bottom on the outside of her clothes.

9.

As a result of this seizure and custodial interrogation, S.G. suffered severe emotional trauma and was psychologically damaged. She was physically ill, she repeatedly threw up, suffered fear, anxiety, depression, humiliation and invasion of privacy.

10.

After completing the interrogation of S.G., Camreta and Alford contacted Plaintiff Sarah Greene at her home. They were in the home when S.G. got off of the bus. S.G. was extremely upset from the interrogation and ran straight to her bedroom. She was obviously extremely upset and appeared to her mother to be scared and emotionally disturbed. Camreta and Alford interfered and prevented Plaintiff Sarah

Greene from consoling her child. They ordered her not to discuss the matter with the child. Camreta and Plaintiff Sarah Greene then discussed a safety plan in which Sarah Greene agreed that Mr. Greene would not be left alone with the children, and that Sarah would cooperate in having S.G. examined.

11.

Sarah Greene asked if S.G. could be examined by her personal physician Dr. Boehm. Camreta told Sarah the exam had to be done at the Center, but that Dr. Boehm worked at the Center. Sarah Greene agreed to take the children to be examined at the Center. Plaintiff Sarah Greene made it clear to Camreta that she expected to be with S.G. during the exam. On February 27, 2003, Plaintiff Sarah Greene signed a medical release allowing Camreta to obtain S.G.'s medical records.

12.

On March 3, 2003, Plaintiff Sarah Greene contacted the Center and spoke to a woman named Jill. Plaintiff informed Jill that she wanted Dr. Boehm to do the examination of her daughter S.G. because she did not want her daughter traumatized by having an invasive examination performed by a stranger. Plaintiff was informed that Dr. Boehm did not work at the Center. Plaintiff was then informed that an appointment had also been scheduled for her daughter K.G. Plaintiff informed the Center on this date that she wanted to, and intended to, be present during the examination of her daughters S.G. and K.G.

13.

On March 6, 2003, Nimrod Greene was indicted for six counts of sex abuse I, one count against F.S. and 5 counts against his daughter S.G. Mr. Greene was arrested and placed in custody on March 6, 2003.

14.

On March 6, 2003, an attorney, hired by the Greene family, sent a letter to Camreta informing him that the entire family wished to exercise their rights under the 5th amendment to remain silent, and that they would not be meeting with Camreta without a member of the attorney's firm present. Camreta was invited to contact the attorney to arrange a meeting for a mutual exchange of information to put to rest any "legitimate concerns your department may have." All medical releases previously executed were revoked, and Camreta was informed that if he needed any documentation from the family, to contact the attorney.

15.

On March 7, 2003, Dr. Boehm wrote a letter on behalf of S.G. documenting S.G.'s extensive medical history relating to repeated urinary tract infections, chronic antibiotic use, and that S.G. had a problem with cleanliness in the genital area, and that "examination of S.G. genitalia and attention to cleanliness is an important part of care by her parents'. There is certainly no reason for her father to be excluded from performing this case."

16.

On March 11, 2003 Camreta submitted an affidavit to the Deschutes County Juvenile Court seeking a protective order for DHS to take custody of S.G. and K.G. Camreta intentionally and knowingly submitted false information in the affidavit and deliberately omitted relevant and material facts which were known to Camreta. Camreta deliberately misinterpreted statements made by S.G. Camreta knew that a safety plan was in place and that it was being honored by Plaintiff Sarah Greene. Without probable cause to believe the children were in danger he obtained the order to remove the children, and did remove the children from their home. S.G. & K.G. were placed in a foster home. Camreta initiated the removal of the children to aid the LEA investigation, not to protect the children.

17.

On March 11, 2003, Camreta removed the children from Plaintiff Sarah Greene's care, custody and control. At the time he did so he knew that the alleged perpetrator, Nimrod Greene, was in custody and not in the home, and there was no danger to the children. Plaintiff Sarah Greene informed Camreta at that time that she had located an alternative residence in which Nimrod Greene could reside when he was released from custody, so there was no threat of future harm to the children. No reasonable person in Camreta's position could have believed there was good cause to remove the children from their home, even with a court order.

18.

The removal of the children from the home caused Plaintiff Sarah Greene, and Plaintiff S.G. and Plaintiff K.G. to suffer severe emotional trauma and upset. All three Plaintiffs were crying, extremely distraught and extremely fearful. The children permanently lost their trust that their parents could protect them and keep them safe. The family relationship was permanently damaged. The Plaintiffs' sense of security was permanently damaged.

19.

At a shelter care hearing on March 12, 2003, Sarah Greene informed Camreta that she wanted to attend any medical exam of S.G. or K.G.

20.

On March 20, 2003, Plaintiff Sarah Greene went to the Center with the expectation that she would be allowed to be present during the interview and examination of her daughter K.G. The Center attempted to conduct an interrogation of Plaintiff Sarah Greene. Plaintiff Sarah Greene was informed by the Center that Camreta and a detective Toney of the Deschutes County Sheriffs Office would be allowed to watch her interrogation. Plaintiff refused to answer the questions without her attorney.

21.

Jane Doe, complying with the specific policies and procedures put in place by Bob Smit at the Center, ordered Sarah to leave the premises prior to the exam. The Center prevented and refused to allow

Plaintiff Sarah Greene to attend the medical examination of her daughter K.G. The Center refused to allow Plaintiff Sarah Green to remain on the premises while her daughter were examined. The Center knew the mother was not suspected of abusing the child. The Center knew that the mother did not consent to the exam taking place without her being present. The Center did allow Camreta and Toney to remain on the premises and to watch the interview of K.G. In the alternative it was Camreta that ordered that Plaintiff Sarah Greene could not remain on the premises or attend the examination of her daughter.

22.

Plaintiff K.G. was subjected to an invasive medical examination from which she suffered embarrassment, humiliation, and extreme emotional distress. The Center did not have a warrant, court order, probable cause or consent of the parent or child to conduct this invasive examination, and there was no exigent circumstances justifying such a traumatic invasion of Plaintiff K.G.'s privacy.

23.

As a result of the Plaintiff Sarah Greene being denied her parental right to stay with her daughter K.G., Plaintiff Sarah Greene and daughter K.G. suffered humiliation, embarrassment, emotional distress and trauma.

24.

On March 31, 2003, Plaintiff Sarah Greene went to the Center to be there for the examination of her daughter S.G.

25.

Jane Doe, complying with the specific policies and procedures put in place by Bob Smit at the Center, ordered Sarah to leave the premises prior to the exam. The Center prevented and refused to allow Plaintiff Sarah Greene to attend the medical examination of her daughter S.G. The Center refused to allow Plaintiff Sarah Green to remain on the premises while her daughter were examined. The Center knew the mother was not suspected of abusing the child. The Center knew that the mother did not consent to the exam taking place without her being present. The Center did allow Camreta and Toney to remain on the premises and to watch the interview of S.G. In the alternative it was Camreta that ordered that Plaintiff Sarah Greene could not remain on the premises or attend the examination of her daughter.

26.

Plaintiff S.G. was subjected to an invasive medical examination from which she suffered embarrassment, humiliation, and extreme emotional distress. The Center did not have a warrant, court order, probable cause or consent of the parent or child to conduct this invasive examination, and there was no exigent circumstances justifying such a traumatic invasion of Plaintiff S.G.'s privacy.

27.

As a result of the Plaintiff Sarah Greene being denied her parental right to stay with her daughter S.G., Plaintiff Sarah Greene and daughter S.G. suf-

fered humiliation, embarrassment, emotional distress and trauma.

28.

Plaintiff Sarah Greene requested copies of the interview notes and the video tape. As a parent she needed access to her childrens medical records in order to properly parent her children. The Center, according to policies and procedures put in place by Bob Smit refused to provide copies of the children's medical records to Plaintiff Sarah Greene.

29.

The refusal to provide the children's parent with access to the children's medical records caused injury to the family relationship and caused Plaintiff Sarah Greene to suffer fear and emotional trauma.

30.

Camreta, Alford, Frieson, Bend LaPine School District, Jane Doe, Bob Smit and the Center, were persons acting under color of State law at all times relevant to this matter.

31.

At all times relevant to this matter the Defendants failed to respect the rights of Sarah Greene and S.G. & K.G. to a familial relationship, and Defendants caused injury to Plaintiffs by their callous disregard of Plaintiffs' rights.

J. A. 25

Count 1

42 USC § 1983

Violation of the 4th Amendment

Unreasonable Seizure

Defendant Friesen seized Plaintiff S.G, on February 24, 2003. Defendant Friesen made an unreasonable seizure of Plaintiff S.G., when she removed her from her classroom. Defendant Friesen knew or reasonably should have known that the child's parents did not consent to removing the child from the classroom for a non-school related activity. The Defendant's actions were a direct and proximate cause of damages suffered by Plaintiff S.G. as alleged above.

Count 2

42 USC § 1983

Violation Of The 4th & 14th Amendment

Unreasonable Seizure By Bend LaPine School District Custom And Policy Unreasonable Interference in Family Relationships by Bend LaPine School District Custom And Policy

The Bend LaPine School District has a custom and policy of seizing children from classrooms and subjecting them to custodial police interrogations without a warrant, parental consent, or probable cause and exigent circumstances. The Bend LaPine School District has adopted this policy with callous disregard of Plaintiff S.G.'s rights under the 4th Amendment to remain free from unreasonable seizures and in violation of the 14th amendment substantive due process

right of parents to direct the care of their children and rights to protect their children. The custom and policies of the Bend LaPine School District caused the unreasonable seizure of S.G. is a direct and proximate cause of the damages she suffered as alleged as above.

Count 3

42 USC § 1983

Violation of 4th Amendment

Unreasonable Seizure And Search By Camreta and Deputy Alford

Camreta and Alford, conducted an unreasonable search and seizure of Plaintiff S.G. by conducting a custodial interrogation without a warrant, parental consent or probable cause and exigent circumstances.

This unreasonable search and seizure as the direct and proximate cause of S.G.'s damages as alleged above.

Count 4

Deschutes County Sheriffs Office Has A Custom And Policy Of Unreasonable Seizure

The Deschutes County Sheriffs Office has a custom and policy of seizing children from classrooms and subjecting them to custodial police interrogations without a warrant, parental consent, or probable cause and exigent circumstances.

The Deschutes County Sheriffs Office has adopted this policy with callous disregard of Plaintiff S.G.'s rights under the 4th Amendment to remain free from

unreasonable seizures and in violation of the 14th amendment substantive due process right of parents to direct the care of their children and rights to protect their children.

The custom and policies of the Deschutes County Sheriffs Office caused the unreasonable seizure of S.G. is a direct and proximate cause of the damages she suffered as alleged as above.

Count 5

42 USC § 1983

Violation of 14th Amendment Substantive Due Process

Camreta unreasonably removed the children from the care and control of Plaintiff Sarah Greene. Camreta's actions caused undue interference in the family relationship of all Plaintiffs. The unreasonable action is a direct and proximate cause of damages as set forth herein above.

Count 6

42 USC § 1983

Malicious Prosecution By Bob Camreta

Camreta intentionally presented false information to the Court to obtain the protective order to take custody of S.G. and K.G. Camreta's actions were the direct and proximate cause of Plaintiffs' damages as set forth herein above.

Count 7

42 USC § 1983

Violation of 14th amendment

Camreta, Jane Doe, Bob Smit and the Center unreasonably interfered in right of the Plaintiffs to be together during the intrusive medical examination. The unreasonable action of excluding Plaintiff Sarah Green is the direct and proximate cause of damages of Plaintiff Sarah Greene, Plaintiff S.G. and Plaintiff K.G., as set forth herein above.

Count 8

42 USC § 1983

Punitive Damages

Camreta, Alferd, Jane Doe, Bob Smit, and the Center, acted with callous disregard to the family relationship of the Plaintiffs and in clear violation of the 4th amendment.

The Defendants' actions were egregious and beyond any level of acceptable social behavior.

Their actions require an award of punitive damages in an amount to be determined by the jury.

Count 9

Injunctive Relief

Plaintiffs Sarah Greene, S.G., and K.G., ask that the Court issue an injunction against the Bend LaPine School District, preventing the school from seizing children from classrooms for non-school activities,

without a warrant, parental consent, or probable cause and exigent circumstances.

Count 10

Injunctive Relief

Plaintiffs Sarah Greene, S.G., and KG., ask that the Court issue an injunction against the Center, preventing them from conducting invasive physical exams of children without a warrant, other court order, parental consent, or probable cause and exigent circumstances. There is not a complete remedy at law, and an award of damages will not assure there will be no future violation.

Count 11.

Attorney Fees

Plaintiffs request attorney's fees pursuant to 42 USC § 1998. There is not a complete remedy at law, and an award of damages will not assure there will be no future violation.

STATE CLIAMS

False Imprisonment

Camreta and Alford confined Plaintiff S.G. to a small room for purposes of conducting their interrogation.

Defendant Camreta and Defendant Alford intended to confine Plaintiff S.G. for purposes of conducting an interrogation.

Plaintiff S.G. was aware that she was confined and that she was unable to leave.

The confinement of Plaintiff was unlawful.

Defendants' actions were the direct and proximate cause of the Plaintiffs injuries as set forth herein above.

Intentional Infliction Of Emotional Distress On [S.G.] And [K.G.]

Defendant Camreta and Defendant Alford knew with certainty that their conduct would cause severe emotional distress to Plaintiff S.G.

Camreta and Alford's conduct in conducting the custodial interrogation, false imprisonment, and unreasonable search and seizure was outrageous and an extraordinary transgression of socially tolerable behavior.

Camreta and Alford's conduct caused Plaintiff S.G. to suffer severe emotional distress.

Defendants' actions were the direct and proximate cause of the Plaintiffs' injuries as set forth herein above

Wherefore Plaintiffs pray for relief as follows:

1. For compensatory damages of not less than $50,000.00; and

2. For injunctive relief as requested herein; and

3. For punitive damages as appropriate; and

4. For attorney fees pursuant to 42 USC § 1988; and

5. For such other and further relief as the Court deems just.

DATED: February 23, 2005

/s/ Mikel R. Miller

Mikel R. Miller, OSB#91475
Attorney for Plaintiffs
(541) 388-9819

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

SARAH GREENE, personally and as next friend for S. G., a minor and K. G., a minor,

Plaintiff,

v.

Civil. No. 05-6047-AA

BOB CAMRETA; DESCHUTES COUNTY DEPUTY SHERIFF JAMES ALFORD; DESCHUTES COUNTY; JANE DOE; BOB SMIT; THE KIDS CENTER; THE BEND-LaPINE SCHOOL DISTRICT; AND TERRY FRIESEN,

Defendants.

JUDGMENT

This action is dismissed.

Dated: March 24, 2006.

Donald M. Cinnamond, Clerk

/s/ C. Pew

by

C. Pew, Deputy

JUDGMENT **DOCUMENT NO:** _____

Steven Griffin, OSB #94325
E-mail address: StevenG@deschutes.org
Deschutes County Legal Counsel
1300 NW Wall Street, Suite 200
Bend, OR 97701
Telephone: (541) 330-4645
Facsimile: (541) 617-4748

Attorneys for Defendant-Appellee James Alford

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,	U.S.C.A. No. 06-35333
Plaintiff-Appellant,	APPELLEE JAMES ALFORD'S MOTION TO JOIN PETITION FOR REHEARING WITH SUGGESTION OF REHEARING *EN BANC* FILED ON BEHALF OF BOB CAMRETA
v.	
BOB CAMRETA; DESCHUTES COUNTY; JAMES ALFORD, Deschutes County Sheriff; BEND LAPINE SCHOOL DISTRICT; TERRY FRIESEN,	
Defendants-Appellees	

Pursuant to Fed. R. App. P. 28(i) and 35(b), defendant-appellee James Alford moves to join in the petition for panel rehearing with suggestion rehearing *en banc* which was filed on behalf of defendant-appellee Bob Camreta.

DATED this 4th day of February, 2010

/s/ Steven Griffin
STEVEN GRIFFIN, OSB #943258
Of Attorneys for
Defendant-Appellee James Alford

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SARAH GREENE, personally and as next friend for S.G., a minor, and K. G., a minor,

Plaintiff-Appellant,

v.

BOB CAMRETA; DESCHUTES COUNTY; JAMES ALFORD; Deschutes County Sheriff; BEND LAPINE SCHOOL DISTRICT; TERRY FRIESEN,

Defendants-Appellees.

No. 06-35333

D.C. No. CV-05-06047-AA
District of Oregon,
Eugene

ORDER

Before: BERZON and BEA, Circuit Judges, and GUTIERREZ,* District Judge.

Appellee James Alford's motion to join Appellee Bob Camreta's petition for rehearing, with suggestion of rehearing en banc, is granted. The California State Association of Counties' motion for leave to file an amicus brief is granted.

---

* The Honorable Philip Gutierrez, United States District Court for the Central District of California, sitting by designation.

IN THE CIRCUIT COURT FOR THE STATE OF OREGON IN THE AND FOR THE COUNTY OF DESCHUTES

SARAH GREENE, personally and as next friend for S.G., a minor, And K. G., a minor,

Plaintiff,

vs. No. 05-CV-6047-AA

BOB CAMRETA; DESCHUTES COUNTY, DESCHUTES COUNTY DEPUTY SHERIFF JAMES ALFORD, JANE DOE, BOB SMIT, THE KIDS CENTER, THE BEND LAPINE SCHOOL DISTRICT, and TEACHER'S AIDE, MRS. FRIESEN,

Defendants.

Deposition of JAMES HENRY ALFORD commencing at 1:08 p.m., on Tuesday, August 9, 2005, at the Law Offices of Mikel R. Miller, P.C., 26 Northwest Hawthorne Avenue, Bend, Deschutes County, Oregon, before ALANE R. HARROLD, Court Reporter, CSR #98-0354.

* * *

[Page 7]

* * *

Q. I'm going to ask if you recall a time period

[Page 8]

when you went to Elk Meadow Elementary School with Bob Camreta.

A. I do.

Q. February 24th or 27th?

A. I don't remember the date, either.

Q. You recall the incident, though?

A. Yes, I do.

Q. How did you come to be with Mr. Camreta on that date?

A. They, the Department of Health Services Children's Services, requested what they call an agency assist to have a police officer present during an interview.

* * *

Q. In this situation do you know why DHS wanted an agency assist?

* * *

A. My assumption is that there had been a crime

[Page 9]

that was being investigated or that had been alleged. And when that's the case I would imagine, or

my assumption is, that they would like to have a law enforcement person there to investigate the criminal half of it or portion of the investigation.

* * *

[Page 10]

* * *

Q. When you went to the school, did you have a warrant for either [S.G.] or - - well, [S.G.]?

A. No.

Q. Did you have any kind of court order in your possession - -

A. No.

* * *

[Page 11]

* * *

Q. Did you have parents' consent to go talk to [S.G.]?

A. No.

* * *

Q. Did you ask Mr. Camreta whether or not he had parents' consent?

A. I don't recall.

Q. Is that something that you would typically be concerned about?

A. No.

* * *

[Page 12]

* * *

Q. Would you consider the interview of S.G. to be a school-related function?

A. No.

* * *

[Page 20]

* * *

Q. As part of the equipment they issue you as an officer, do you get a tape recorder?

A. Yes, I do.

Q. Did you use a tape recorder during that interview?

A. No, I did not.

* * *

[Page 22]

* * *

Q. Do you recall anyone telling [S.G.] she didn't have to be there if she didn't want to be?

A. No, I don't recall that.

[Page 23]

Q. Do you recall anyone telling her she could get up and leave if she wanted?

A. No.

* * *

Q. Would you agree that a kid being pulled out of class and stuck in a room with a police officer might think she has to be there?

* * *

A. Yeah.

* * *

[Page 25]

* * *

Q. What do you believe your role was there?

A. I believe that my role was once something criminal had been disclosed to make sure that as far as the investigation was concerned that the investigation portion concerning the criminal matter that those questions were asked. * * *

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

SARAH GREENE, personally and as Next friend for S.G., a minor, and K. G., a minor,

Plaintiffs,

vs. Case No. 05-CV-6047-AA

BOB CAMRETA; DESCHUTES COUNTY, DESCHUTES COUNTY DEPUTY SHERIFF JAMES ALFORD, JANE DOE, BOB SMIT, THE KIDS CENTER, THE BEND LAPINE SCHOOL DISTRICT, and TEACHER'S AIDE, MRS. FRIESEN,

Defendants.

Deposition of SARAH RAY GREENE commencing at 1:10 p.m., on Wednesday, July 27, 2005, at 26 N.W. Hawthorne Avenue, Bend, Oregon 97701, before GENIE L. KELLEY, R.P.R., C.M., C.S.R. #90-0149.

* * *

[Page 69]

* * *

Q. Does [S.G.] have any type of learning disability?

A. Comprehension, cognitive, delayed --

Q. Has she been --

A. – processing.

Q. Has she been diagnosed with any mental or developmental problems?

A. She did an – there was an evaluation done by

[Page 70]

Elk Meadow in the third grade and that's when this became apparent, so Elk Meadow is aware of this.

Q. That's when what became apparent?

A. That her cognitive and her comprehension was below normal. They stated she processed things very differently. She was slow to respond or understand.

* * *

[Page 95]

* * *

Q. So do you have any factual information based on your observation of any emotional distress by your daughter at school that day or on the school bus coming home?

A. Yes. She told me during the interrogation she felt like throwing up the whole time. She felt sick.

* * *

A. She told me that night, that night on the 24th.

Q. Before or after your husband had been arrested?

A. Before, on the 24th, the day she came home from the interrogation.

Q. Before or after her father –

A. She threw up five times because I saw it.

* * *

[Page 97]

* * *

A. * * *-- because [S.G.] said all the kids were lined up at the library. That's the time they leave to go back to the school, and [S.G.] had said she saw all the busses lining up, so she was very upset thinking she was going to be missing her bus.

* * *

[Page 143]

* * *

Q. Hang on. What did you ask specifically the day after the police were at your house?

A. I asked her if daddy had ever touched her in way she didn't approve of or didn't like, is there any touching, anything you want to tell me.

Q. What did she say?

A. She said no.

* * *

[Page 144]

* * *

Q. After that day, after that day, did you ever go back to [S.G.] and ask her again whether there had been any sexual touching by her father?

A. Probably a week later I asked her again, giving her time to think and see if there is anything she wants to tell me, if she is holding back or whatever. I just didn't know.

* * *

Q. On that occasion a week later, what did you ask her?

A. I didn't really want to question her at all because I was told not to. She first came to me, made a statement to me, you know, just saying that Camreta kept saying bad things, bad things about dad, and she couldn't understand why they were asking bad things about dad, and I said well, is there anything you want to tell me, anything – did anything happen, has anything ever happened, and she said no. She said he just kept – Camreta just kept asking her what bad things has your daddy done to you, and Mr. Camreta kept

[Page 145]

saying that isn't it, that isn't it, that isn't it, and that's when I called [Nimrod's criminal] investiga-

tors at that point and told them he needed to talk to her because I'm not supposed to talk to her. * * *

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

SARAH GREENE, personally and as Next friend for S.G., a minor, and K. G., a minor,

Plaintiffs,

vs. Case No. 05-CV-6047-AA

BOB CAMRETA; DESCHUTES COUNTY, DESCHUTES COUNTY DEPUTY SHERIFF JAMES ALFORD, JANE DOE, BOB SMIT, THE KIDS CENTER, THE BEND/LAPINE SCHOOL DISTRICT, and TEACHER'S AIDE, MRS. FRIESEN,

Defendants.

Deposition of SARAH RAY GREENE – Volume II commencing at 10:00 a.m., on Tuesday, August 30, 2005, at 26 N.W. Hawthorne Avenue, Bend, Oregon 97701, before GENIE L. KELLEY, R.P.R., C.M., C.S.R. #90-0149.

* * *

[Page 251]

* * *

Q. What did she tell you about the interview [with Bob Camreta]?

A. She kept telling me "mom, they kept saying what bad things does your dad do to you," and that's – she just said they kept asking her that over and over and over again.

Q. Did she say who? You say, "they."

A. Camreta. She was referring to Camreta. I

[Page 252]

think she said Mr. Alford didn't say much. He might have asked one or two questions that I recall she said, but I don't know what they were.

* * *

[Page 253]

* * *

Q. What do you recall [S.G.] telling you or talking to you about a couple days later about her interview at school?

A. One thing that was troubling, she said that Mr. Camreta kept saying "that isn't it, that isn't it, and so I realized after she told me that with the first question being "what bad things does your dad do to you," he kept going on and on with that and then he would come in in the end and at the

end I guess she said later he finally just kept saying "that isn't it, that isn't it, that isn't it" to her.

* * *

[Page 254]

* * *

A. * * * Alford's concern I recall when he came to me in the house was their first concern was we want to see [S.G.'s] door, is there a lock, and I said no, there is no lock on her door, there hasn't been a lock on her door since two or three days after we bought the house because I don't put locks on my kids' doors. I want be able to go in as a parent and know what's going on. So he saw then and there there was no lock, yet in the report it does state a lock.

* * *

[Page 255]

A. * * * she did keep telling me she felt sick and nauseous and kept looking at the clock, and she saw the busses come in, she told me. You know, after we discussed the time, we did discuss the time again, because the first time she told me she thought it was about an hour, and then I think we discussed it probably that same 27th I'm guessing, we realized that it wasn't an hour, it was more like two because she told me she could see through the blinds the busses were coming in and them lining up, which happens at about three, and that she went in just after her lunch break, which is an hour, quarter of one she comes back into class.

* * *

[Page 257]

* * *

A. And then she just came in the house, and immediately as she came through the door she said "mom I feel sick," and I was still sitting there having my conversation with Camreta, and she went straight to the bathroom.

* * *

[Page 261]

* * *

Q. You testified earlier – I believe that you said you told Mr. Camreta that basically it was okay with you for [K.G.] and [S.G.] to be evaluated at The KIDS Center.

A. [K.G.] was not an issue at that point. It was just [S.G.] was the concern, and his concern and questions were in regards to [S.G.] and that he wanted her to be checked out at The KIDS Center and asked her – after he informed me what the place was I said I'll take her, give me the appointment right now.

* * *

Q. So you don't object to the fact that [S.G.] and then also [K.G.] ultimately were evaluated at The KIDS Center? You don't object to the fact that they were evaluated there; is that correct?

A. No. I was willing to take them to prove the was no physical harm to my daughters.

* * *

[Page 264]

* * *

Q. So again you are not objecting to the fact – you wouldn't have objected to your daughter S.G. or your daughters being interviewed, your objection is to

[Page 265]

the manner in which the interview took place?

A. Procedures, the manner, absolutely, the whole thing.

* * *

[Page 270]

* * *

A. * * * As I stated before, I'm sure there was a level of intimidation having an officer in a closed room and two strange adults with a nine-year old present and no one else to even inform her of what to do or say, meaning a psychologist from the school. Circumstances under much duress and intimidation, and as I stated earlier with leading questions stating "what bad things does your dad do" and also "that isn't it, that isn't it," what do you think you are going to get from a nine-year-old after two hours? * * *

* * *

[Page 290]

* * *

A. * * * the girls were released to me the day of [S.G.'s] appointment.

* * *

[Page 297]

* * *

Q. * * * The issue is the exam, and the exam if it was not invasive and it was the normal exam that is given by KIDS Center personnel, you were okay with that, weren't you?

A. Yes, because I knew they were not abused. That's why I was willing to expedite the appointments.

* * *

[Page 299]

* * *

Q. What did [S.G.] say to you?

A. Well, the first time was when she kept saying they just didn't stop saying "what bad things does your dad do to you." That one was the first time she said

[Page 300]

anything was that statement.

Q. What else did she say?

A. The second main statement that sticks with me is when she said "Camreta kept saying that isn't it, that isn't it," and I was appalled.

Q. Anything else?

A. I was – she was tired, she told me, really tired, and I think she said she said what she thought they wanted to hear. She just – they kept going on and on. That's the main stuff I remember.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

SARAH GREENE, personally and as Next friend for S.G., a minor, and K. G., a minor,

Plaintiffs,

vs. Case No. 05-CV-6047-AA

BOB CAMRETA; DESCHUTES COUNTY, DESCHUTES COUNTY DEPUTY SHERIFF JAMES ALFORD, JANE DOE, BOB SMIT, THE KIDS CENTER, THE BEND/LAPINE SCHOOL DISTRICT, and TEACHER'S AIDE, MRS. FRIESEN,

Defendants.

Deposition of S.G. commencing at 9:00 a.m., on Thursday, July 28, 2005, at 26 N.W. Hawthorne Avenue, Bend, Oregon 97701, before GENIE L. KELLEY, R.P.R., C.M., C.S.R. #90-0149.

* * *

[Page 29]

* * *

Q. Did you get scared?

A. At what time?

Q. At any time when you were being questioned did you get scared?

A. I was scared and I had a stomach ache and I did not feel good.

Q. What happened when Ms. Friesen then opened the door and you saw the police officer and this other man? What happened at that point?

A. I was not feeling very good.

* * *

[Page 33]

* * *

Q. What time was it when you got there in the

[Page 34]

room?

A. 1:00.

Q. Exactly 1:00?

A. Yes.

* * *

Q. How long were you in the room?

A. Until 3:00, because I looked on the wall, I kept looking at the clock, and every time I turned my head he would be staring at me.

Q. Who would be staring at you?

A. Camreta.

* * *

[Page 36]

* * *

Q. Were you sick?

A. Yes.

Q. Why didn't you tell him?

A. I was too scared.

* * *

Q. Why were you scared?

A. I didn't know what I was doing there.

Q. Did you ask them?

A. No.

Q. Why not?

A. I was too scared to ask him any questions.

* * *

[Page 40]

* * *

Q. Have you ever heard of sexual abuse?

A. No.

* * *

Q. Have you ever seen news stories about kids being abused by adults?

A. No

* * *

[Page 41]

Q. So what did you think they were talking to you about, then, if you have never even heard of abuse? What did you think they were talking to you about?

A. I don't know.

Q. Did you have any idea?

A. No.

* * *

Q. Were you asked questions whether your dad had done anything wrong to you?

A. Yes.

Q. Did you understand what they were asking?

A. No.

* * *

Q. So you are in the room for two hours, you are feeling sick but you don't tell anybody that, right?

A. Yes.

[Page 42]

Q. You are feeling scared but you don't tell anybody that.

A. Yes

Q. You give truthful answers for a couple hours.

A. Yes.

Q. Then you decide to lie?

A. Yes, just to get out of the room.

* * *

Q. Why did you decide to lie?

A. I had a feeling that's what he wanted to hear, just lies, not truth.

* * *

[Page 43]

* * *

Q. What did you tell them that was a lie?

A. That he abused me.

Q. Had you ever heard the word "abuse" before that day?

A. No.

Q. Do you know what abuse means?

A. No.

[Page 44]

Q. Is that the word you used?

A. No.

* * *

Q. So when you lied on purpose and told these that your dad abused you, you were basically saying yes to their questions?

A. Yes.

Q. And what did you think they meant when they used that word?

A. I didn't know.

* * *

[Page 49]

* * *

Q. Did they refuse to let you have water?

A. Yes.

Q. Did you ask for water and they wouldn't give it to you?

A. I did not ask.

Q. Why not?

A. I was too scared.

* * *

[Page 51]

* * *

Q. Did you understand that they were talking about sex?

A. No.

Q. What did abuse mean to you when you used that word?

A. I didn't know what that meant.

* * *

[Page 63]

* * *

Q. Think about it. Didn't you feel guilty that you had lied about your dad?

A. Yes.

* * *

Q. Is that one reason you got sick and threw up?

A. Yes.

* * *

[Page 80]

* * *

Q. Was anybody scary or intimidating besides Mr. Camreta?

A. No.

Q. What were you afraid of when you were talking

[Page 81]

to Mr. Camreta?

A. I was afraid that he was like going to do something.

* * *

[Page 103]

* * *

Q. Do you have a lock on your room?

A. No.

* * *

[Page 152]

* * *

Q. And you said that the deputy did not ask you any questions; is that correct?

A. No, he didn't.

Q. How was he? Was he nice to you when you were in the room?

A. He just sat there.

* * *

[Page 159]

* * *

Q. And your dad did some things to you that for a while you thought was abuse?

A. No.

Q. What physical things did he do to you that you remember referring to when you said he abused you? Did he touch you on your body?

A. No.

Q. Was he touching your body when he was being playful?

A. No.

Q. You said he was tickling your feet.

A. Yes.

[Page 160]

Q. What else was he tickling?

A. Nothing else.

* * *

Mikel R. Miller
OSB #91475
E-Mail: mike@lawofficeofmikelmiller.com
Law Office of Mikel R. Miller, P.C.
26 N.W. Hawthorne Avenue
Bend, OR 97701
Telephone: (541) 388-9819
Fax: (541) 317-4987
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

SARAH GREENE, personally and as next friend for S. G., a minor, and K. G., a minor,

Plaintiffs

v

BOB CAMRETA, DESCHUTES COUNTY, DESCHUTES COUNTY DEPUTY SHERIFF, JAMES ALFORD, JANE DOE, BOB SMIT, THE KIDS CENTER, THE BEND LAPINE SCHOOL DISTRICT and TEACHER'S AIDE MRS. FRIESEN,

Defendants.

Case No. 05-CV-6047-AA

AFFIDAVIT OF PLAINTIFF SARAH GREENE IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

STATE OF OREGON)
)
County of Deschutes)

I, SARAH GREENE, having been first duly sworn, depose and state:

1. I am one of the Plaintiffs in the above-entitled matter, and I make this affidavit based on my personal knowledge and in support of my opposition to Defendants' Motions for Summary Judgment.

2. I discussed the allegations against my husband with my daughter, S.G., immediately after Mr. Camreta and Deputy Alford informed me of these allegations on February 24, 2003. I simply asked her what she had said to Mr. Camreta. At first she was too upset to talk. She threw up five times that afternoon and couldn't eat dinner. She told me Camreta asked, "what bad things has your dad done?" She told me she told them, "nothing", but that Camreta kept saying, "No, that's not it" and would ask the question again. My daughter has always been easily confused. She often tells stories to divert attention from herself or to make others happy. She was emotionally abused and coerced into making whatever statements Camreta claims.

3. I have reviewed the allegations made by F.S., the alleged victim of my husband. I found it very interesting that when F.S. reported my husband had touched him, the touching that was most upsetting to him was that my husband had tied F.S.'s shoelaces together. F.S. did not claim my husband touched him until questioned by his mom and dad. The alleged

touching was on the outside of F.S.'s clothes while he was sitting down. I have spoken to others in the community and have learned that F.S. has a reputation for being a liar.

4. Even if my husband had actually touched F.S., there was no evidence from F.S. demonstrating that it was not an inadvertent touch. There was no evidence from F.S. implying any kind of sexual intent. Yet all of the adults involved immediately made the assumption that any touching must equal sexual abuse, and then, the prosecution machinery began to roll.

5. I know that the allegations by F.S. were ridiculous, as were the alleged allegations made by my daughter, S.G. My husband elected not to accept a deal, and to take the matter to trial. To our shock, it came back as a hung jury. I believe that the fact there were two sets of allegations was directly responsible for someone on the jury not seeing how foolish the claims were. Despite having favorable polygraphs and psycho-sexual evaluations, the District Attorney insisted they would retry the case against my husband. It became clear that being "not guilty" of a crime was no protection against being convicted (see numerous Innocence Projects.) Having spent our entire life savings and having taken out a second mortgage on our home to pay for the first trial, our family was facing financial ruin. We could not afford to pay an attorney for a second trial. Having learned that it was possible to be convicted even though innocent, and possibly sentenced to prison for up to 22 years, my husband decided to take an Alford plea. The no jail offer from

the District Attorney assured he could remain employed and support his family.

6. When I allowed S.G. to attend public school, I had no knowledge that she could be removed from her classroom and subjected to a custodial interrogation by police and DHS for two hours. Had I known this information, I would have taken all steps within my means to prevent this from happening, including removing her from public school.

7. At no time, did I ever expressly or impliedly give consent to Bend-LaPine School District to remove my daughter from her classroom for the purpose of being subjected to a two-hour custodial interrogation by strange men. The school should have contacted me and asked my permission. I would not have objected to my daughter being questioned in an appropriate manner with a tape recorded statement, done according to accepted practices and with me allowed to be there or at least able to observe my daughter. I wanted to know what she was saying. I did not want an incompetent, untrained and unprofessional social working getting a coerced statement and trying to make her say something and telling me that was what she had said. Someone from the school should have been there to assure my daughter was not subjected to emotional abuse and interrogation techniques designed to elicit false claims of abuse.

8. On February 24, 2003, when Mr. Camreta first came to my home, he and I entered into a Safety Plan in which we agreed that my husband would not be left alone with the children. I honored that Safety

Plan, with the understanding that my children would remain in my home.

9. On March 7, 2003, Mr. Carmeta came to my home to discuss my husband's pending release from jail, and that my husband was no ordered to stay away from our children. At that time, I specifically informed Mr. Camreta that, while it would be significantly detrimental to our family finances, there was a place where my husband could stay so that he would have no contact with my children. I specifically informed Mr. Camreta that I intended to abide by our Safety Plan and that I would take the children to the KIDS Center.

10. On March 7, 2003, I specifically informed Mr. Camreta that I did want my children interviewed at the KIDS Center, and that I would not interfere with them being interviewed. I also specifically informed Mr. Camreta that I wished to attend my children's medical examination, to be there to help them through the emotionally traumatic event.

11. I attended the Shelter Care hearing on March 12, 2003, at which time I asked the Court to return my children to me. Mr. Camreta stood up and informed the Court that there was a specific parental counseling program available through the KIDS Center to teach parents how to act with their children when there are pending allegations. Mr. Camreta specifically asked the Court not to return my children to me until I had taken such a class. The Court agreed, and issued the Shelter Care order, which specifically provided that,

"Court directs DHS to return children to mother's home as soon as Safety Plan is in place and DHS concerns have been addressed."

I had already entered into an acceptable Safety Plan with Bob Camreta prior to the issue of this order and I had confirmed with him that I would continue to abide by the Safety Plan. The children would have been returned to me at Court, had not Mr. Camreta asked that I attend said counseling class.

12. I immediately contacted the KIDS Center and asked them about such parenting programs, and they said one did not exist. At no time did I ever find any counseling program available designed to help parents deal with children with pending sexual abuse allegations. Bob Camreta had no legitimate concerns preventing him from returning the children immediately.

13. Mr. Camreta deliberately and intentionally failed to enter into any type of Safety Plan with me which would have allowed my children to be returned to me. He had no concern for the injury it would create for the children.

14. I showed up at the KIDS Center on March 20, 2003, when I knew my daughter, K.G., was being interviewed and examined. I fully intended to cooperate with the KIDS Center and lend whatever assistance and support I could to my daughter. I was informed at the KIDS Center that, while Bob Camreta and a police detective named Merlin Toney would be allowed to listen to the interview and medical examina-

tion of my daughter, I would be denied that right. I was ordered by the staff at the KIDS Center, who were under orders of Bob Camreta, to leave the premises so that I was denied the ability to lend comfort to my daughter.

15. I showed up at the KIDS Center again on March 31, 2003, for the examination and interview of my daughter, S.G., and was once again ordered by the KIDS Center staff to leave the premises.

16. Only after the KIDS Center confirmed that my daughters had not been abused by their father did DHS withdraw their petition and my children were returned to me.

The above is true and correct to the best of my knowledge and belief.

DATED this 5 day of January, 2006.

/s/ Sarah Greene
SARAH GREENE

SUBSCRIBED AND SWORN to before me this 5th day of January, 2006, by SARAH GREENE.

/s/ Holly L Van Loo
Notary Public for Oregon
My Commission Expires: 1-7-07

Mikel R. Miller
OSB #91475
E-Mail: mike@lawofficeofmikelmiller.com
Law Office of Mikel R. Miller, P.C.
26 N.W. Hawthorne Avenue
Bend, OR 97701
Telephone: (541) 388-9819
Fax: (541) 317-4987
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

SARAH GREENE, personally and as next friend for S. G., a minor, and K. G., a minor,

Plaintiffs

Vs.

BOB CAMRETA, DESCHUTES COUNTY, DESCHUTES COUNTY DEPUTY SHERIFF, JAMES ALFORD, JANE DOE, BOB SMIT, THE KIDS CENTER, THE BEND LAPINE SCHOOL DISTRICT and TEACHER'S AIDE MRS. FRIESEN,

Defendants.

Case No. 05-CV-6047-AA

AFFIDAVIT OF SG IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

STATE OF OREGON)
)
County of Deschutes)

I, SG, having been first duly sworn, depose and state:

1. I am "SG", one of the Plaintiffs in the above-entitles action. I make this affidavit based on my personal knowledge and in support of my Opposition to Defendants' Motions for Summary Judgment.

2. At the time of this matter, I was a fourth grade student attending public school at Elk Meadow. My teacher at that time was Lisa Bangert.

3. When I was 9 years old, I just agreed to everything. I had to do what the teachers told me to do. My parents taught me to respect the authority of the school, and instructed me to always do as I was told by the school faculty.

4. On February 24, 2003, I was attending class as usual. Some time after lunch, the school counselor, Terry Friesen, came and told me to get up and leave the class. I believed Ms. Friesen was coming to get me for a school purpose. Ms. Friesen, in the past, had been the one to come get me and take me to speech and tutoring sessions I had been attending at the school.

5. Instead of being taken to one of my normal places, I was taken by Ms. Friesen and delivered into the custody of two men I did not know. One was an armed police officer. I did not believe I was free to leave. I believed that I had to stay and could not

leave. No one explained to me why I was there. No one asked me if I wanted to be there or if I wanted to have my mom with me.

6. I was scared.

7. With an armed police officer there, I thought it must be a serious matter. I didn't know what was going on. The other person that was with the police officer started asking me questions, like he was trying to be my friend or something. But I didn't know who he was. I later learned his name was Bob Camreta. He started asking me if my dad touched me.

8. Then this person started asking me if sometimes my dad touched me all over my body. I thought back to the times when my dad hugged me, kissed me, gave me piggy-back rides, rides on his shoulders and horsey rides. I remembered all of my dad's touches with fondness. He was a very loving father, and I loved hugging and kissing him. These were the touches that I was referring to when I said my dad touched me.

9. So I told the man, yes, my dad touches me all over. And then the man started asking me if sometimes those were bad touches, and I said, no they weren't, but he kept asking me over and over again, and I would say, no, I don't think my dad touched me in a bad way. He would say, "No, that's not it," and then ask me the same question again. For over an hour, Bob Camreta kept asking me the same questions, just in different ways, trying to get me to change my answers. Finally, I just started saying yes to whatever he said. And then after a while, he said I

could go. I believe I was there for two hours. No one came to get me so I got up and went back to my room by myself. When I got back to the room, the lights were out and everyone was at the library. At the library, the kids were getting ready to go and the buses were coming. I had been in there all afternoon. I didn't know what had happened. When I left, my stomach felt upside down and I was confused and disoriented.

10. I got on my bus and went home. My dad was not at the bus stop to meet me like he usually was. I really needed him, because I felt like barfing. I walked home and saw the police car at our house. That upset me. When I got inside the house, the police officer and the other man, Bob Camreta, were there. They were in there talking to my mom and dad, and I didn't know what was going on. I was scared. I went straight to my room. I asked my sister to get me a bucket because I felt like throwing up. Later my mom asked me what had happened. I told her the same people that had been here at our house were at my school asking me questions but that I didn't remember anything except that they had been asking me a lot of questions. I threw up that night, at least five times.

11. About two weeks later they came and took me away from my mom. They put me in a car with a man and a woman I didn't know and they took me away to a place I didn't know in LaPine. The man talked to about my dad and questioned me about my dad all the way down there and I didn't know what to say. I finally said I had a headache and I was going to take

a nap. People kept asking me about "abuse" and I didn't even know what "abuse" was.

12. They placed me in a foster home in LaPine, Oregon and the woman there questioned me every night, repeatedly, about what I had said and what was going on and what I had better say when I went to the KIDS Center.

13. Then I was taken to some doctor's office, but it wasn't my doctor. I was full of strangers I had never seen before. I didn't know who they were. I wish my mom could have been there. I felt very scared and alone.

14. They asked me all sorts of questions and then they looked all over my body, and it was very uncomfortable. I felt like a prisoner and that I had to do everything they told me. I did not want to be examined. I wish I had not had to go through that. I never understood why it was happening to me. They took pictures of my private parts and never asked my permission.

15. If I had known what was going to happen to me and that I had a choice, I would never have gotten out of my seat in the classroom and gone to that room.

16. At my deposition, I don't remember what I said. It went on for almost four hours, and I was disoriented, confused and wanted it over as soon as possible.

The above is true and correct to the best of my knowledge and belief.

DATED this 5 day of January, 2006.

/s/ S.G.
"SG"

SUBSCRIBED AND SWORN to before me this 5th day of January, 2006, by "SG".

/s/ Holly L Van Loo
Notary Public for Oregon
My Commission Expires: 1-7-07

Supreme Court, U.S.
FILED
DEC 9 - 2010
OFFICE OF THE CLERK

6 4

Nos. 09-1454 and 09-1478

In the Supreme Court of the United States

BOB CAMRETA, Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

JAMES ALFORD, Deschutes County Deputy Sheriff, Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER BOB CAMRETA

JOHN R. KROGER
Attorney General of Oregon
*MARY H. WILLIAMS
Solicitor General
ANNA JOYCE
Deputy Solicitor General
1162 Court Street
Salem, Oregon 97301-4096
Phone: (503) 378-4402
mary.williams@doj.state.or.us
Counsel for Petitioner
Bob Camreta

*Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

217a

55

QUESTIONS PRESENTED

(1) The State received a report that a nine-year-old child was being abused by her father at home. A child-protection caseworker and law-enforcement officer went to the child's school to interview her. To assess the constitutionality of that interview, the Ninth Circuit applied the traditional warrant/warrant-exception requirements that apply to seizures of suspected criminals. Should the Ninth Circuit, as other circuits have done, instead have applied the balancing standard that this Court has identified as the appropriate standard when a witness is temporarily detained?

(2) The Ninth Circuit addressed the constitutionality of the interview in order to provide "guidance to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment [,]" and it thus articulated a rule that will apply to all future child-abuse investigations. Is the Ninth Circuit's constitutional ruling reviewable, notwithstanding that it ruled in petitioner's favor on qualified immunity grounds?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

A. After receiving information that the child's parent may have been sexually abusing her, an officer and a child-protective caseworker went to the child's public school to interview her. 2

B. S.G.'s mother filed a § 1983 action, and the district court granted summary judgment in favor of Camreta. 5

C. The Ninth Circuit concluded that Camreta violated the Fourth Amendment when—without a warrant, court order, exigent circumstances, or parental consent—he interviewed S.G. at her school about suspected sexual abuse by her father. 7

SUMMARY OF ARGUMENT 9

ARGUMENT 13

A. The Fourth Amendment requires that a seizure be "reasonable." In the context of a seizure of a potential victim of child abuse, that determination requires balancing the government's interests and the individual's privacy expectations. 14

1. The Fourth Amendment guarantees the right to be secure from "unreasonable" seizures; it does not categorically require a warrant based on probable cause. 16

2. Where, as here, the type of seizure was neither approved nor disapproved at the time of the Fourth Amendment's enactment, the *Terry*/*Lidster* balancing of governmental and individual interests applies. 22

B. Considering the government's substantial interest in preventing child sexual abuse and the child's reduced liberty interest while in school, a seizure of a suspected child-abuse victim at her school is reasonable at its inception. 24

1. The State has an extraordinary interest in investigating sexual abuse reports, preventing further harm to the victims, and conducting the investigations in a manner that is least traumatic for the victims. 24

2. Balanced against the government's extraordinary interest in protecting children against child abuse is the lesser expectation of privacy that children in schools have. 30

3. The Ninth Circuit refused to consider—as the Fourth Amendment requires—the "reasonableness" of the seizure, instead focusing on the government's failure to satisfy the "special-needs" rule. 34

C. The Ninth Circuit correctly concluded that the scope of the seizure was not so clearly unreasonable as to preclude qualified immunity and that holding is not before this Court. 38

D. Because the State is bound by the Ninth Circuit's legal ruling in this and all future cases, the Ninth Circuit's judgment in favor of the state on qualified immunity grounds does not preclude this Court from reaching the legal issue presented. 41

CONCLUSION 44

TABLE OF AUTHORITIES

Page

Cases Cited

Board of Ed. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls,
536 U.S. 822 (2002) 30, 37

Brigham City v. Stuart,
547 U.S. 398 (2006) 17

Brinegar v. United States,
338 U.S. 160 (1949) 16

Brown v. Texas,
443 U.S. 47 (1979) 18, 20

Buchanan v. Maine,
469 F.3d 158 (1st Cir. 2006) 39

Bunting v. Mellen,
541 U.S. 1019 (2004) 41, 42, 44

Calabretta v. Floyd,
189 F.3d 808 (9th Cir. 1999) 7

Camara v. Municipal Court,
387 U.S. 523 (1967) 14, 17, 35

Chandler v. Miller,
520 U.S. 305 (1997) 36

Doe v. Bagan,
41 F.3d 571 (10th Cir. 1994) 6

Dunaway v. New York,
442 U.S. 200 (1979) 16, 18

Ferguson v. City of Charleston,
532 U.S. 67 (2001) 36-37

Greene v. Camreta,
588 F.3d 1011 (9th Cir. 2009) ..... *passim*

Horne v. Coughlin,
191 F.3d 244 (2d Cir. 1999) 44

Hudson v. Palmer,
468 U.S. 517 (1984) 32

Illinois v. Lidster,
540 U.S. 419 (2004) 9-10, 15, 19-23, 37

Jackson v. City of Bremerton,
268 F.3d 646 (9th Cir. 2001) 8

Lassiter v. Dep't of Soc. Services,
452 U.S. 18 (1981) 26

Mich. Dep't. of State Police v. Sitz,
496 U.S. 444 (1990) 15, 19

Mueller v. Auker,
576 F.3d 979 (9th Cir. 2009) 39

New Jersey v. T.L.O.,
469 U.S. 325 (1985) 6-7, 30, 34-35

New York v. Burger,
482 U.S. 691 (1987) 36-37

Pearson v. Callahan,
__U.S.__, 129 S. Ct. 808 (2009) 8, 39, 42-44

Pennsylvania v. Ritchie,
480 U.S. 39 (1987) 27, 40

Saucier v. Katz,
533 U.S. 194 (2001) 41-43

Scott v. Harris,
550 U.S. 372 (2007) 39

Skinner v. Railway Labor Executives' Ass'n.,
489 U.S. 602 (1989) 17, 36

Terry v. Ohio,
392 U.S. 1 (1968) ..... *passim*

Treasury Employees v. Von Raab,
489 U.S. 656 (1989) 17, 19, 21, 27, 32

United States v. Martinez-Fuerte,
428 U.S. 543 (1976) 16

United States v. Montoya de Hernandez,
473 U.S. 531 (1985) 17

Vernonia School Dist. 47J v. Acton,
515 U.S. 646 (1995) 20, 22-23, 30-31, 36

Wyman v. James,
400 U.S. 309 (1971) 25

Constitutional & Statutory Provisions

28 U.S.C. § 1254(1) (2006) 1

42 U.S.C. § 1983 (2006) 2, 5, 44

42 U.S.C. § 5106a(a)(2)(A) 28

Child Abuse Prevention and Treatment
Act (CAPTA), *as amended by*
The Keeping Children and Families
Safe Act of 2003,
Pub. L. No. 108-36, Title I, § 101,
117 Stat. 800,
42 U.S.C. § 5101 ..... 25-26, 28-29

Conn. Gen. Stat. Ann. § 17a-101h (2010) 29

Kan. Stat. Ann. § 38-2226(g)(1) (2010) 33
Mich. Comp. Laws Ann. § 722.628(8) (West 2010)... 33
N.C. Gen. Stat. Ann. § 7B-1400 (2010) 26
N.Y. Exec. Law § 642-a(1) (McKinney 2009) 28
Or. Rev. Stat. § 30.285 (2009) 43
Or. Rev. Stat. § 419B.007 (2009) 26
Or. Rev. Stat. § 419B.020(1)(a) (2009) 3
Or. Rev. Stat. § 419B.020(2)(a) (2009) 28
Or. Rev. Stat. § 419B.045 (2009) 4, 33
U.S. Const. amend IV ..... *passim*
U.S. Const. amend. XIV 2, 5

Other Authorities

44 Op. Att'y Gen. 416 (Or. 1985) 44

An Act Concerning the Care and Education of Neglected Children, 1866 Mass. Acts ch. 283 23

Catherine Dixon, *Best Practices in the Response to Child Abuse*, 25 Miss. C. L. Rev. 73 (2005) 24-25, 28-29

Ching-Tung Wang and John Holton, Prevent Child Abuse America, *Total Estimated Cost of Child Abuse and Neglect in the United States* 5 (2007) 25

Derek Regensburger,
DNA Databases and the Fourth Amendment: The Time Has Come to Reexamine the Special Needs Exception to the Warrant Requirement and the Primary Purpose Test,
19 Alb. L.J. Sci. & Tech. 319 (2009) 35-36

Doriane Lambelet Coleman,
Storming the Castle to Save the Children: The Ironic Costs of A Child Welfare Exception to the Fourth Amendment,
47 Wm. & Mary L. Rev. 413 (2005) 36

John E.B. Myers,
A Short History of Child Protection in America,
42 Fam. L.Q. 449 (2008)..... 22

Lindsey E. Cronch et al.,
Forensic Interviewing in Child Sexual Abuse Cases: Current Techniques and Future Directions,
11 Aggression and Violent Behavior 195 (2006)... 29

Shanta R. Dube,
Long-Term Consequences of Childhood Sexual Abuse by Gender of Victim,
28 Am. J. Prev. Med. 430 (2005)..... 25

U.S. Department of Health and Human Services,
Administration for Children and Families,
Administration on Children,
Youth and Families, Children's Bureau,
Child Maltreatment 2008, at 23 (2010) 24-25

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit—reported at *Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009)—appears in the appendix to the petition for a writ of certiorari. Pet. App. 1. The unreported district court's opinion also appears in that appendix. Pet. App. 55.

JURISDICTION

The Ninth Circuit filed its opinion on December 10, 2009. The Ninth Circuit denied rehearing by order dated March 1, 2010. The State timely filed its petition for a writ of certiorari on May 27, 2010. This Court granted the petition on October 12, 2010. The same day, this Court granted the petition for writ of certiorari in *Alford v. Greene*, 09-1478, and consolidated the two cases. This Court's jurisdiction rests on 28 U.S.C. § 1254(1) (2006). On November 17, 2010, this Court granted Camreta's request for a two-week extension of time in which to file the opening brief on the merits.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law[.]"

Section 1983 provides, in pertinent part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]" 42 U.S.C. § 1983 (2006).

STATEMENT OF THE CASE

A. After receiving information that the child's parent may have been sexually abusing her, an officer and a child-protective caseworker went to the child's public school to interview her.

For purposes of this Court's review, petitioner recites the following facts, as recounted by the Ninth Circuit.[1] Police arrested Nimrod Greene (Nimrod) on February 12, 2003, for sexually abusing F.S., a seven-year-old boy. *Greene*, 588 F.3d at 1016. F.S. reported to his parents that Nimrod had touched F.S.'s penis

---

[1] Because Greene appealed a grant of summary judgment in favor of Camreta, the court drew all reasonable inferences in Greene's favor. *Greene*, 588 F.3d at 1021.

over his jeans when Nimrod was intoxicated, and that Nimrod had done that once before as well. *Id.* F.S.'s mother told police officers that Nimrod's wife, Sarah, had talked about how she did not like the fact that Nimrod made their daughters, nine-year old S.G. and five-year old K.G., sleep with him in his bed when he was intoxicated. *Id.* F.S.'s father told officers that Nimrod himself had commented that his wife Sarah had accused him of sexually abusing his daughters and that she did not like S.G. and K.G. lying in bed with Nimrod when he had been drinking. *Id.*

The Oregon Department of Human Services (DHS) learned of those allegations about a week after police arrested Nimrod. *Id.* The following day, Bob Camreta, a caseworker for DHS, learned that Nimrod had been released from jail and was having unsupervised contact with K.G. and S.G. *Id.* DHS assigned Camreta to assess the children's safety. *Id.*; *see* Or. Rev. Stat. § 419B.020(1)(a) (2009) (requiring DHS to investigate allegations of child abuse "immediately"). Based on his training and experience, Camreta was "'aware that child sex offenders often act on impulse and often direct those impulses against their own children, among others. For this reason, [he was] concerned about the safety and well-being of Nimrod Greene's own small children.'" *Greene*, 588 F.3d at 1016 (brackets in original).

The following Monday, Camreta and Deputy Sheriff Alford went to S.G.'s public school to interview her. *Greene*, 588 F.3d at 1016; J.A. 70. Camreta chose to interview her at her school because schools are "a place where children feel safe" and because doing so

would allow him "'to conduct the interview away from the potential influence of suspects, including parents.'" *Greene*, 588 F.3d at 1016; *see also* Or. Rev. Stat. § 419B.045 (2009) (allowing for child abuse investigations to take place on public school premises). According to Camreta, "'[i]nterviews of this nature, on school premises, are a regular part of [child-protective services] practice and are consistent with DHS rules and training.'" *Greene*, 588 F.3d at 1016 (brackets in original). DHS did not inform S.G.'s mother, Sarah, about the interview. *Id.* at 1016-17. Neither Camreta nor Alford obtained a warrant or other court order before the interview. *Id.* at 1017.

When Camreta and Alford arrived at S.G.'s school, Camreta told school officials that he and Alford wanted to interview S.G. and he requested use of a private office. *Id.* Terry Friesen, a school counselor, went to S.G.'s classroom and told her that someone was there to talk with her. *Id.* Friesen took S.G. to the room where Camreta and Alford were waiting, and then left. *Id.* According to S.G., Camreta interviewed S.G. for two hours in Alford's presence, although Alford did not ask any questions during the interview. *Id.* Alford was in uniform and had a visible firearm. *Id.* The interview was not recorded. *Id.*

According to Camreta, during the interview S.G. disclosed several incidents of sexual abuse by Nimrod. In contrast, S.G. later recounted that she felt pressured by Camreta and "'just started saying yes to whatever he said.'" *Id.*

The State indicted Nimrod on six counts of felony sexual assault involving S.G. and F.S. *Id.* at 1018. A

jury could not reach a verdict on the charges. *Id.* at 1020. Facing a retrial, Nimrod accepted an *Alford* plea with respect to the charges involving F.S. *Id.* In exchange, the State dismissed the charges related to S.G. *Id.*

B. S.G.'s mother filed a § 1983 action, and the district court granted summary judgment in favor of Camreta.

On behalf of herself and her minor children (S.G. and K.G.), respondent Sarah Greene sued Camreta under 42 U.S.C. § 1983 (2006) for alleged violations of the Fourth and Fourteenth Amendments.[2] *Greene*,

---

[2] Greene, on behalf of S.G., alleged Fourth Amendment claims against Bend LaPine School District and Deschutes County based on allegations of an official policy or long standing custom of allowing State officials to seize children such as S.G. Greene also brought a claim on behalf of S.G. against the school guidance counselor for her role in removing S.G. from class for the interview. The district court rejected those claims, and Greene did not challenge that holding before the Ninth Circuit. *Greene*, 588 F.3d at 1020 n.4. Rather, Greene focused on S.G.'s claims against Camreta and Alford, arguing that both had violated S.G.'s Fourth Amendment right to be free from unreasonable seizures. Greene also argued that, when Camreta removed the children from her home and excluded her from S.G.'s physical examination, he violated both her children's and her due process rights under the Fourteenth Amendment.

On appeal, the Ninth Circuit reversed on Greene's two Fourteenth Amendment due process claims, holding that Camreta was not entitled to immunity and that there were genuine issues of material fact precluding summary judg-

588 F.3d at 1020. Greene alleged that Camreta violated S.G.'s Fourth Amendment right to be free from unreasonable seizures when he had S.G. removed from her classroom, taken to another room, and subjected to an interview about possible sexual abuse by her father. *Id.*

The district court granted summary judgment in favor of Camreta. *Id.* The court ruled that S.G. had been seized for purposes of the Fourth Amendment, but that no constitutional violation occurred. *Id.* The court looked to this Court's decisions in *Terry v. Ohio*, 392 U.S. 1 (1968), and *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), and to the Tenth Circuit's application of those cases in *Doe v. Bagan*, 41 F.3d 571 (10th Cir. 1994). Pet. App. 62-63. In *Bagan*, the Tenth Circuit considered whether the in-school seizure of a nine-year-old boy by a social-services caseworker to interview him about his possible sexual abuse of another child violated the Fourth Amendment. *Bagan*, 41 F.3d at 573-74. Applying the balancing test from *Terry*, as incorporated in *T.L.O.*, the court in *Bagan* held that no constitutional violation occurred. *Id.* at 574 n.3. It reasoned that the seizure "was justified at its inception because a victim of child abuse had identified [the boy] as her abuser[, and] a ten minute interview with a social services caseworker was reasonably related in scope to determining [the boy]'s role in the incident." *Id.*

---

ment. *Id.* Camreta has not sought review of that ruling, and those claims have been remanded to the district court.

Viewing the facts in the light most favorable to Greene, the district court concluded first that S.G. had been seized. Pet. App. 62. Then, under the *Terry/T.L.O.* analysis, the court concluded that the seizure of S.G. was reasonable at its inception (supported by a reasonable suspicion that S.G. had been sexually abused by her father) and was reasonable in scope (the interview's length was justified under the circumstances). Pet. App. 63-64. The court ruled alternatively that, even if the seizure were unconstitutional, qualified immunity protected Camreta from liability. Pet. App. 64-65.

C. The Ninth Circuit concluded that Camreta violated the Fourth Amendment when—without a warrant, court order, exigent circumstances, or parental consent—he interviewed S.G. at her school about suspected sexual abuse by her father.

On appeal, the Ninth Circuit concluded that its decision in *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999), went "a fair way" towards resolving the issue presented. *Greene*, 588 F.3d at 1022. That case involved a social worker and a police officer visiting the family home, entering without consent, and interviewing and examining the children. The Ninth Circuit held that traditional Fourth Amendment protections—that is, the "'general law of search warrants'"—applied to child-abuse investigations. *Greene*, 588 F.3d at 1030 (quoting *Calabretta*, 189 F.3d at 814). The Ninth Circuit also concluded that the seizure could not be justified under the "special-needs doctrine," because the government had failed to iden-

tify a need, beyond the normal need for law enforcement, to justify a seizure in the absence of a warrant. *Greene*, 588 F.3d at 1030.

At the same time, the Ninth Circuit agreed with the district court's ruling that because the constitutional right at issue was not clearly established, Camreta was protected by qualified immunity. *Id.* at 1033. To determine whether the constitutional right was clearly established, the Ninth Circuit considered the "'objective legal reasonableness of the action'" and whether Camreta "'could . . . have reasonably but mistakenly believed that his . . . conduct did not violate a clearly established constitutional right[.]'" *Id.* at 1031 (quoting *Pearson v. Callahan*, __U.S.__, 129 S. Ct. 808, 822 (2009), and *Jackson v. City of Bremerton*, 268 F.3d 646, 651 (9th Cir. 2001)). Applying that standard, the court first concluded that Camreta "could have reasonably believed that the decision to seize S.G. was sufficiently justified at its inception." *Greene*, 588 F.3d at 1031. Next, the court concluded that Camreta reasonably could have concluded that the seizure also was justified in its scope: although Camreta interviewed the victim for two hours in a "closed" room with a law-enforcement officer present, that length of interview was necessary because S.G. became more responsive and began disclosing the sexual abuse as the interview progressed. *Id.* at 1031-33. The Ninth Circuit nevertheless made explicit that "government officials investigating allegations of child abuse should cease operating on the assumption that a 'special need' automatically justifies dispensing with traditional Fourth Amendment protections in this context." *Id.* at 1033.

Camreta petitioned the Ninth Circuit for rehearing. Pet. App. 78. Camreta argued that the Ninth Circuit should apply the standard this court articulated in *Illinois v. Lidster*, 540 U.S. 419 (2004). Pet. App. 89-91. The Ninth Circuit denied the petition for rehearing. Pet. App. 76-77.

Camreta then petitioned for a writ of certiorari, which this Court granted.

SUMMARY OF ARGUMENT

A child protection caseworker and a law-enforcement officer received information that made them suspect that a child was being sexually abused by her father at home. They went to the child's public school—a safe location away from the offending parent—and interviewed her about the allegations. The Ninth Circuit concluded that that seizure was unconstitutional under the Fourth Amendment at its inception because it was unsupported by either a warrant based on probable cause or an exception to the warrant requirement.

In so holding, the Ninth Circuit ignored the most fundamental of Fourth Amendment principles: every seizure must be "reasonable." And reasonableness, in turn, is not determined by rigid adherence to the warrant requirement. That holds particularly true when the seizure at issue is less intrusive than that involved in a traditional arrest. Beginning with *Terry v. Ohio*, this Court has repeatedly recognized that the reasonableness of a seizure is determined by balancing the government's interests in the seizure against the individual's privacy expectations. That reason-

ableness inquiry is a dual one that considers both whether the seizure was justified at its inception and whether the seizure was reasonably related in scope to the circumstances justifying the seizure in the first place.

In *Terry*, that balancing inquiry led to the now familiar reasonable suspicion standard for a stop and frisk. But in *Illinois v. Lidster*, this Court recognized that the Fourth Amendment does not require every seizure to be supported by a particular level of suspicion. Instead, when the seizure at issue is one that is effected not to investigate an individual for criminal wrongdoing but rather to determine whether that individual was a witness to a crime, courts simply balance the government's interests against the individual's privacy rights and the degree to which the seizure advanced the government's interests, to determine whether the seizure is reasonable at its inception and in its scope.

That balancing test also provides the proper analytic framework when there was no clear practice either approving or disapproving the type of seizure at issue at the time that the Framers created the Fourth Amendment. Here, no clear practice of compulsory education or organized government child protection existed at the time of the Fourth Amendment's framing. Strict adherence to the warrant requirement is therefore inappropriate.

In light of those fundamental Fourth Amendment principles, the seizure at issue here was reasonable. Balancing the government's interests against the child's privacy expectations, the seizure was justified

at its inception. The government's interest in protecting children from abuse is substantial. Child abuse is an epidemic of national proportions, and protecting children from that abuse is one of society's fundamental goals. The government has a compelling interest in conducting child-abuse investigations in a manner that is least likely to be traumatic for the child and is least likely to taint disclosures of abuse. To accomplish these goals, law-enforcement officers and child-protective caseworkers frequently will conduct joint investigations to minimize the number of times the child has to be interviewed. Balanced against those substantial government interests is the reduced privacy expectation that children have at schools. As this Court has recognized, during the course of the school day schoolchildren are subject to the control of the state. That control is enduring while the child is at school, even as to non-school government officials. Moreover, statutes and rules require school teachers to report instances of suspected abuse and, in some cases, mandate that the investigations take place at schools, further demonstrating that the expectation of privacy of children in school is less than that of adults. The alternatives to an in-school interview are fraught with potential peril for child victims or are impractical. Seeking parental consent is simply not a safe or viable option when the suspected abuser is a parent. Obtaining a warrant based on speculation and hearsay—without interviewing the child—may be impossible or inadvisable because development of probable cause often depends upon the victim who may be the sole witness to the suspected crime.

The Ninth Circuit's refusal to apply the balancing test was based in its belief that the government was unable to satisfy the "special-needs doctrine" that would allow the government to conduct a seizure based on a particular governmental interest "beyond the normal need for law enforcement." But the special-needs doctrine and its focus on the level of law-enforcement involvement does not apply when the potential for self-incrimination is minimal or absent. Here, where the seizure occurred to determine whether the child was a victim of a crime, the presence of law enforcement and whether law enforcement gathered evidence with respect to someone other than that child does not render the seizure unconstitutional.

Thus, because the government interests in investigating allegations of suspected child abuse are so substantial and compelling, a seizure of a child in a school to investigate allegations of child abuse satisfies the Fourth Amendment mandate that searches and seizures be reasonable. That is precisely what occurred here: acting on a report that the child's father might be sexually abusing her, a law-enforcement officer and caseworker went to the child's school to interview her about the allegations. The seizure was thus justified, and reasonable, at its inception.

Finally, the fact that the Ninth Circuit ultimately concluded that Camreta is entitled to qualified immunity does not preclude review of the question whether the Ninth Circuit applied the proper constitutional standard to determine whether the seizure was constitutional. The Ninth Circuit's decision now

stands as precedent that governs how government officials must conduct child-abuse investigations in the nation's largest circuit. Absent the ability to seek further review in this case, the government either must comply with what it believes to be an erroneous decision or continue interviewing potential child-abuse victims without first obtaining warrants and incurring significant liability in the process. The court's decision in this case is not mere "dicta" that would otherwise preclude this Court's review.

ARGUMENT

The Ninth Circuit held that a temporary detention of a potential child-abuse victim at her school for an interview about the suspected abuse is reasonable—and therefore constitutional—only when supported by a warrant based on probable cause.[3] The Ninth Circuit thus applied the same Fourth Amendment standard that applies to the arrest of criminal suspects. But the determination of what is "reasonable" under the Fourth Amendment depends on the context of the seizure. When the context of a seizure is less intrusive than that involved in a traditional arrest, involves a potential witness or victim of a crime, and when historically no practice existed disapproving such a seizure, a warrant based on probable cause is not required to make the seizure "reasonable." Rather, and as relevant here, government officials may—without a warrant, an exception to the warrant requirement, or parental consent—detain and inter-

[3] All references to the warrant requirement include any exceptions to the warrant requirement.

view a potential child-abuse victim at her school to determine whether additional, protective actions are necessary. A seizure in that context satisfies the Fourth Amendment requirement that all seizures be "reasonable."

A. The Fourth Amendment requires that a seizure be "reasonable." In the context of a seizure of a potential victim of child abuse, that determination requires balancing the government's interests and the individual's privacy expectations.

The Ninth Circuit determined that nothing short of a warrant based on probable cause would render an interview of a potential child-abuse victim at the child's school reasonable, and thus constitutional. But the Fourth Amendment guarantees "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures . . . and no Warrants shall issue, but upon probable cause[.]" The Fourth Amendment does not, as the Ninth Circuit concluded, categorically require a warrant based on probable cause for every seizure; it requires only that that seizure be "reasonable." To be sure, the abstract notion of "reasonableness" "is a difficult task which has for many years divided the members of this Court." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). This Court has examined and applied that standard in a number of different contexts. For instance, this Court has considered the reasonableness of seizures of individuals suspected of wrongdoing, yet the seizures have been less intrusive than traditional arrests. *E.g.*, *Terry v. Ohio*, 392 U.S. 1 (1968).

Other cases have involved suspicionless seizures or searches of individuals as part of a broader, systematic program not targeted at any particular individual. *E.g.*, *Mich. Dep't. of State Police v. Sitz*, 496 U.S. 444 (1990). And still others have involved the seizure of potential witnesses to a recent crime. *E.g.*, *Lidster*, 540 U.S. 419.

While the factual underpinnings of the seizures in those cases have varied, a unifying governing principle can be extracted from each: rather than requiring rigid adherence to the warrant requirement, every seizure—particularly a seizure that is less intrusive than a traditional arrest or one that is undertaken not to investigate an individual for having committed a crime—must be assessed under the Fourth Amendment's mandate that a search or seizure be reasonable. That determination in turn is judged by balancing a seizure's intrusion on the individual's privacy rights against its promotion of legitimate governmental interests. And in some cases, the government interests are so substantial and compelling that, when compared to an individual's privacy interest, a warrantless seizure may nevertheless satisfy the Fourth Amendment mandate that searches and seizures be reasonable. This is such a case: rather than applying the traditional warrant requirement that applies to arrests of criminal suspects, as the Ninth Circuit did, this Court should assess the reasonableness of the seizure of a potential victim of child abuse by balancing the competing interests involved.

1. The Fourth Amendment guarantees the right to be secure from "unreasonable" seizures; it does not categorically require a warrant based on probable cause.

While probable cause and warrant requirements have long been considered important components of Fourth Amendment seizures, they have never been viewed as a necessary substitute for the Fourth Amendment's mandate of reasonableness. Traditionally, the "'long-prevailing standards' of probable cause embodied 'the best compromise that has been found for accommodating [the] often opposing interests' in 'safeguard[ing] citizens from rash and unreasonable interferences with privacy' and in 'seek[ing] to give fair leeway for enforcing the law in the community's protection.'" *Dunaway v. New York*, 442 U.S. 200, 208 (1979), (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)) (alterations in original in *Dunaway*). "The term 'arrest' was synonymous with those seizures governed by the Fourth Amendment." *Id.* Therefore, under the "traditional" or "general" approach, the probable cause and warrant requirements applied to all Fourth Amendment seizures—or arrests—of persons "without the need to 'balance' the interests and circumstances involved in particular situations." *Id.*

But the Fourth Amendment does not impose an "irreducible requirement" of probable cause and a warrant based upon individualized suspicion. *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976); *see also Terry*, 392 U.S. at 27 (allowing for a stop and frisk based on reasonable suspicion). Rather, the ul-

timate touchstone of the Fourth Amendment is "reasonableness." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). "What is reasonable, of course, 'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.'" *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, 619 (1989) (quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)). To determine the reasonableness of a search or seizure in the absence of a warrant, "it is necessary to balance the individual's privacy expectations against the government's interests to determine whether," in the particular context, requiring a warrant or some level of individualized suspicion is "impractical." *Treasury Employees v. Von Raab*, 489 U.S. 656, 668 (1989); *see id.* at 665-66 ("the traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions"); *see also Skinner*, 489 U.S. at 616-18 (holding a drug urinalysis to be a search); *Camara*, 387 U.S. at 536-37 (there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.").

That reasonableness balancing test applies, for instance, to seizures of suspected criminals that are less intrusive than those in traditional arrests. *Terry*, 392 U.S. at 20. In *Terry*, because the intrusion involved in a "stop and frisk" was less intrusive than that involved in an arrest, "the Court declined to stretch the concept of 'arrest'—and the general rule requiring probable cause to make arrests 'reasonable' under the Fourth Amendment—to cover such intrusions."

Dunaway, 442 U.S. at 209 (explaining *Terry*). "And to determine the justification necessary to make this specially limited intrusion 'reasonable' under the Fourth Amendment, the Court balanced the limited violation of individual privacy involved against the opposing interests in crime prevention and detection and in the police officer's safety." *Id.* (citing *Terry*, 392 U.S. at 22-27). The result of that balancing approach, of course, was the now-familiar "reasonable suspicion" standard for a "stop and frisk". *Terry*, 392 U.S. at 27.

Terry thus departed from traditional Fourth Amendment analysis by "defin[ing] a special category of Fourth Amendment 'seizures' so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test." *Dunaway*, 442 U.S. at 210. To apply that test, courts balance "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown v. Texas*, 443 U.S. 47, 51 (1979). And because the Fourth Amendment "proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation[,]" that balancing is part of a dual reasonableness inquiry that takes into consideration "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20, 28.

This Court concluded in *Terry* that some level of individualized suspicion—*i.e.*, reasonable suspicion—was required to render the "stop and frisk" "reasonable." *Terry*, 392 U.S. at 27. But, at least broadly speaking, the Fourth Amendment does not mandate individualized suspicion in cases in which the seizure is not to investigate an individual of having committed a crime, but rather is a part of "routine administrative functions." *Von Raab*, 489 U.S. at 668. In such cases, requiring a showing of probable cause is "unhelpful": when the government seeks to prevent the development of hazardous conditions or detect violations, the government's efforts to do so will "rarely generate articulable grounds for searching any particular place or person." *Id.* at 668-72 (applying balancing test and concluding that no warrant is required before conducting mandatory drug testing of Customs Service officers involved in drug interdiction or who carry firearms); *see also Mich. Dep't. of State Police v. Sitz*, 496 U.S. 444, 451-55 (1990) (applying balancing test and concluding government's need to eradicate drunk driving on the nation's freeways was so substantial that law enforcement did not need warrants before conducting checkpoint seizure, so long as the checkpoint advanced the public interest).

Until *Illinois v. Lidster*, the cases in which the Fourth Amendment's general balancing test had been applied primarily involved either (1) seizures of individuals suspected of wrongdoing but whose seizures were less intrusive than traditional arrests and (2) seizures that were effected as part of a systematic program, such as routine drug tests. But in *Lidster*, this Court considered the constitutionality of detain-

ing potential witnesses to a crime. At issue was whether the brief, suspicionless detention of motorists at a police checkpoint to determine if they had witnessed a recent hit-and-run accident in the area amounted to an unreasonable seizure under the Fourth Amendment. *Lidster*, 540 U.S. at 422. This Court first recognized that the stop's "primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime," but rather to solicit assistance in gathering information about a crime that someone else committed. *Id.* at 423 (emphasis in original). And when officers seize a potential witness, "by definition, the concept of individualized suspicion has little role to play." *Id.* at 424.

This Court thus concluded that the Fourth Amendment does not demand a warrant or probable cause as a necessary predicate to the seizure of potential witnesses. Instead, to determine whether the warrantless seizure of the motorists was reasonable, the Fourth Amendment requires a balance of the government's interests served by the seizure, the individual liberty interests at stake, and "'the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.'" *Id.* at 427 (quoting *Brown*, 443 U.S. at 51). That balancing assumes that "a warrant is not required to establish the reasonableness of *all* government [seizures]; and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required[.]" *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (emphasis in original). This Court then concluded that the seizure of the individual to determine

whether he was a witness to a crime was both reasonable at its inception and in its scope, because the stop was tailored to the need, was minimally intrusive given the government interest, and the stops were uniformly administered. *Lidster*, 540 U.S. at 426-28.

The foregoing fundamental Fourth Amendment principles—as articulated in *Terry*, *Von Raab*, and *Lidster*—demonstrate that this Court must assess the reasonableness of the seizure at issue in this case by balancing the various interests at play. The seizure here—an interview of a child at her school to determine whether she was the victim of sexual abuse by her father—is not an arrest of an individual suspected of having committed a crime. Accordingly, mechanically applying the standard that applies to arrests of criminal suspects, as the Ninth Circuit did, fails to take into account this Court's repeated admonitions that the ultimate inquiry in evaluating the constitutionality of *any* seizure is whether it is reasonable. That question is one that can be answered only by balancing the government's interests against the individual's privacy interests. In some cases—particularly, as explained in more detail below, in those cases involving seizures not contemplated by the Framers—the government's interest in the seizure may be so substantial as to outweigh the individual's limited privacy rights. And when that seizure is proportional in scope to the reasons for the seizure, it satisfies the Fourth Amendment's mandate that every seizure be reasonable.

2. Where, as here, the type of seizure was neither approved nor disapproved at the time of the Fourth Amendment's enactment, the *Terry/Lidster* balancing of governmental and individual interests applies.

The balancing test described in *Terry* and *Lidster* applies with particular force when, at the time of the Fourth Amendment's enactment, government officials did not routinely engage in the type of seizure at issue. "[W]here there was no clear practice, either approving or disapproving the type of search at issue at the time [the Fourth Amendment] was enacted, whether [the] particular search meets the reasonableness standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Vernonia*, 515 at 652-53 (internal quotation marks and citations omitted).

As relevant here, in-school interviews of children by child–protective caseworkers and police officers to investigate child abuse did not occur at the time the Fourth Amendment was enacted. In the late 1700s, states had neither compulsory education nor governmental child-protection organizations. Compulsory education did not exist until the late 1800s. *Vernonia*, 515 U.S. at 653 n.1. Similarly, no system—formal or otherwise—for child protection existed at the time of the Fourth Amendment's enactment. John E.B. Myers, *A Short History of Child Protection in America*, 42 Fam. L.Q. 449, 449-51 (2008). Not until 1866 did Massachusetts pass the first law authorizing in-

tervention in the family when a child was being harmed "'by reason of orphanage or of the neglect, crime, drunkenness or other vice of parents.'" *Id.* at 450 (quoting An Act Concerning the Care and Education of Neglected Children, 1866 Mass. Acts ch. 283). Organized child-protection agencies emerged shortly afterwards, in the 1870s, but those agencies were operated exclusively by nongovernmental agencies. *Id.* at 451-52. By 1922, 300 nongovernmental organizations existed, but many cities and rural areas still had little to no access to those child-protective services. *Id.* at 452. Not until after the Great Depression did governmental child-protection agencies widely exist. *Id.* In short, no practice existed—either approving or disapproving—the detention of children to investigate claims of child sexual abuse at the time of the Fourth Amendment's enactment. In fact, no organized practice of protecting children existed at all until the 1900s.

Thus, the context of the seizure at issue here must take into account not only the fact that the seizure was of a victim of, and perhaps sole witness to, a crime, but also the fact that no practice approving or disapproving seizures of this sort existed at the time of the Fourth Amendment's framing. Accordingly, this Court must employ the balancing test described in *Terry* and *Lidster* to assess the reasonableness of the in-school interview of the child to determine whether her father had sexually abused her. *Vernonia*, 515 U.S. at 652-53. That balancing test must take into account the government's interest in protecting children against abuse and the child's privacy rights while at school. As explained in more detail be-

low, that balancing tips heavily in favor of permitting government officials, without having first obtained a warrant, to interview a child at her school to determine if her father had sexually abused her.

B. Considering the government's substantial interest in preventing child sexual abuse and the child's reduced liberty interest while in school, a seizure of a suspected child-abuse victim at her school is reasonable at its inception.

1. The State has an extraordinary interest in investigating sexual abuse reports, preventing further harm to the victims, and conducting the investigations in a manner that is least traumatic for the victims.

The government has a compelling interest in preventing child abuse. Child abuse is, without a doubt, a national epidemic. The most recent study on child abuse shows that between 750,000 and 900,000 children are the victims of various forms of child abuse or neglect every year. U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, *Child Maltreatment 2008*, at 23 (2010), *available at* http://www.acf.hhs.gov/programs/cb/stats_research/index.htm#can; Catherine Dixon, *Best Practices in the Response to Child Abuse*, 25 Miss. C. L. Rev. 73, 73 (2005). Yet other studies suggest that as many as one in four girls, and one in seven boys, will experience some form of sexual abuse. Dixon, *Best Practices*, *supra*, at 74; *see generally* Shanta R. Dube, *Long-Term*

Consequences of Childhood Sexual Abuse by Gender of Victim, 28 Am. J. Prev. Med. 430 (2005) (providing general statistics on prevalence of abuse, broken down by gender). A parent is the abuser in over 80% of child-abuse cases. *Child Maltreatment 2008* at 28. The ramifications of child abuse present a heavy burden on our society: child-abuse victims are more likely to develop addictions to drugs and alcohol, commit violent crimes as adults, suffer psychological disorders, experience teen pregnancy, and to abuse their own children. Dixon, *Best Practices*, *supra*, at 75-78. The estimated annual cost of child abuse and neglect to the country is $104 billion a year. Ching-Tung Wang and John Holton, Prevent Child Abuse America, *Total Estimated Cost of Child Abuse and Neglect in the United States* 5 (2007), *available at* http://member.preventchildabuse.org/site/DocServer/cost_analysis.pdf?docID=144; *see also* Child Abuse Prevention and Treatment Act (CAPTA), *as amended by* The Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36, Title I, § 101, 117 Stat. 800, 801-02, 42 U.S.C. § 5101 ("the failure to coordinate and comprehensively prevent and treat child abuse and neglect threatens the future of thousands of children and results in a cost to the Nation of billions of dollars in tangible expenditures, as well as significant intangible costs").

Unsurprisingly, then, this Court has recognized that preventing and uncovering child abuse is a compelling government interest. In fact, protecting children is one of society's most important roles. *Wyman v. James*, 400 U.S. 309, 318 (1971) ("There is no more worthy object of the public's concern [than that of car-

ing for the young[.]"). As *parens patriae*, the State has an "urgent interest" in the welfare of all children. *Lassiter v. Dep't of Soc. Services*, 452 U.S. 18, 27 (1981). The State is thus charged with protecting children, who are not yet able to protect themselves, from suffering the trauma of child abuse. And that charge is codified in both federal and state policies. For instance, CAPTA contains Congressional findings about the severity of the child-abuse epidemic and the risks that failing to address the problem creates. It provides that "substantial reductions in the prevalence and incidence of child abuse and neglect and the alleviation of its consequences are matters of the highest national priority[.]" Pub. L. No. 108-36, Title I, § 101, 117 Stat. 800, 801-02, 42 U.S.C. § 5101. The government's interest in preventing and investigating child abuse also is reflected in state policies addressing child protection. *See, e.g.*, Or. Rev. Stat. § 419B.007 (2009) ("for the purpose of facilitating the use of protective social services to prevent further abuse, safeguard and enhance the welfare of abused children, and preserve family life . . ., it is necessary and in the public interest to require mandatory reports and investigations of abuse of children"); N.C. Gen. Stat. Ann. § 7B-1400 (2010) ("[I]t is the public policy of this State to prevent the abuse, neglect, and death of juveniles. The General Assembly further finds that the prevention of the abuse, neglect, and death of juveniles is a community responsibility[.]").

And the government's interest in preventing child abuse must be considered in the context in which child abuse occurs. The Ninth Circuit, relying on Oregon law that permits caseworks to obtain a court or-

der to conduct an in-school interview based on probable cause that a child has been abused, concluded that caseworkers must avail themselves of that process (a process akin to obtaining a warrant). *Greene*, 588 F.3d at 1030. But child abuse, and particularly child sexual abuse, is a crime that takes place behind closed doors. The opportunity to develop proof independent of the victim is thus remote, and investigative interviews of suspected child-abuse victims almost always occur before government officials have "probable cause" to believe the abuse has occurred. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) ("Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim."). In addition to its interest in protecting children against abuse and neglect, the government has a substantial interest in being able to interview a child suspected of being a victim of child abuse, without delay, and thus before there is enough information to obtain a warrant. *See Von Raab*, 489 U.S. at 668 (where having to obtain a warrant would only frustrate the government from being able to uncover a "latent or hidden condition" that poses a health or safety threat, a warrantless seizure can be reasonable"). Framed another way, the alternatives to government officials being able to conduct an in-school interview are often fraught with potential peril for child victims or are impractical. Seeking parental consent is simply not a safe or viable option when the suspected abuser is a parent. Obtaining a warrant based on speculation and hearsay—without interviewing the child—may be impossible or inadvisable because development of probable cause

often depends upon the victim who may be the sole witness to the suspected crime.

Equally compelling as the government's interest in protecting children from sexual abuse is the government's interest in conducting child-abuse investigations in a manner that is safest for the child victim. In many cases, the "best practice" for interviewing suspected child-abuse victims includes a single joint interview with law enforcement and child–protective caseworkers present. *See* Dixon, *Best Practices*, *supra*, at 82 ("Within a very short time, the child could be questioned about a very traumatic incident by eight different professionals. For a child who is injured and also traumatized, this is an additional system-induced trauma."). Congress codified this preference for multi-disciplinary teams in CAPTA by recognizing the need for improved child-abuse prevention efforts by "creating and improving the use of multidisciplinary teams and interagency protocols to enhance investigations[.]" 42 U.S.C. § 5106a(a)(2)(A). Most states thus either require or permit multidisciplinary investigations.[4] Reducing the number of interviews

---

[4] *See, e.g.*, Or. Rev. Stat. § 419B.020(2)(a) (2009) ("The department [of Human Services] and the law enforcement agency shall jointly determine the roles and responsibilities of the department and the agency in their respective investigations[.]"); N.Y. Exec. Law § 642-a(1) (McKinney 2009) (criminal agencies shall use multi-disciplinary teams to investigate and prosecute child-abuse cases, in part to "minimize the number of times the child is called upon to recite the events"); Conn. Gen. Stat. Ann. § 17a-

not only minimizes the amount of trauma to the child, but also lowers the risk that the child's statements will be contaminated by multiple interviews. Dixon, *Best Practices*, *supra*, at 83 ("Ultimately, children who are interviewed multiple times may begin to recant, if only to stop the frightening, overwhelming process of the investigation. By coordinating the multi-agency response to child abuse, and by designating a forensic interviewer, children are spared additional stress and better information is obtained, inevitably leading to better decision-making."). And that, in turn, reduces the chance that an individual who stands accused of child abuse will be wrongfully convicted based on contaminated statements. *See* Lindsey E. Cronch et al., *Forensic Interviewing in Child Sexual Abuse Cases: Current Techniques and Future Directions*, 11 Aggression and Violent Behavior 195, 196 (2006) (poorly conducted interviews can lead to eliciting false allegations, contaminating facts and increased stress on the child).

That the Ninth Circuit found fault with the fact that a law-enforcement officer joined the caseworker in interviewing the child ignores these practical considerations and encourages the fractured system that CAPTA sought to avoid. *Greene*, 588 F.3d at 1027. The very presence of the law-enforcement officer, with the caseworker, was particularly designed to protect both the child and the accused. The government's interest in conducting a multi-disciplinary,

---

101h (2010) (investigatory activities to be coordinated "in order to minimize the number of interviews of any child").

joint interview that protects the victim, the accused, and the legal process does not detract from the reasonableness of the interview, as the Ninth Circuit held, but instead reinforces its reasonableness.

In short, then, this Court should conclude that the government has an extraordinary interest in investigating allegations of and protecting children from sexual abuse, and in doing so in a manner that both reduces the trauma to the victim and protects against contaminated statements that could lead to improper convictions.

2. Balanced against the government's extraordinary interest in protecting children against child abuse is the lesser expectation of privacy that children in schools have.

This Court has recognized repeatedly that the public school context is unique. Students are subject to a "degree of supervision and control that could not be exercised over free adults," and they "'have a lesser expectation of privacy than members of the population generally.'" *Vernonia*, 515 U.S. at 655, 657 (quoting *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring)). "A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety." *Board of Ed. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 536 U.S. 822, 830 (2002). For those reasons, students' "'Fourth Amendment rights . . . are different in public schools than elsewhere[.]'" *Earls*, 536 U.S. at 829-30 (quoting *Vernonia*, 515 U.S. at 656). Thus, while children at public school have some expectation

of privacy, it is less than that of an adult in his or her home or walking down the street. The reasonableness of seizures taking place at public schools must therefore be judged in light of this reduced expectation of privacy.

This Court previously has been called upon only to consider schoolchildren's reduced expectation of privacy vis-à-vis seizures committed by school officials. But the reduced expectation of privacy that schoolchildren have is unaltered by the fact that in some cases—as here—caseworkers and law-enforcement officers are the ones interviewing schoolchildren. During the course of the school day, schoolchildren are subject to the control of the State. *See Vernonia*, 515 U.S. at 665 (government acts as "a guardian and tutor of children entrusted to its care"). As a result, they are generally not at liberty to leave the school building when they wish. Whether it is a teacher or a child-protective caseworker from the community, children in public schools simply are not free to do as they choose when they choose and where they choose. *See Vernonia*, 515 U.S. at 654 ("[U]nemancipated minors lack some of the most fundamental rights of self-determination—including even . . . the right to come and go at will.").

For example, schoolchildren are subject to any number of non-school officials talking with them during school hours: community members frequently come in to give guest lectures and provide specialized services. The city's mayor may ask to visit schools to talk with students about local government processes. Law-enforcement officers, as part of a community-

policing effort, may conduct outreach at local schools to talk about safety-related issues. An outside medical professional may come in to test individual student's hearing. Yet in each of those scenarios, the schoolchildren are not free to leave these presentations notwithstanding the fact that the individual talking to them is not a school official. And in none of those scenarios are the schoolchildren unconstitutionally seized.

Moreover, all fifty states and the District of Columbia have statutory schemes dealing with the prevention and investigation of child abuse of schoolchildren, statutes that further inform the legitimacy of any expectation of privacy that schoolchildren may have. *See Hudson v. Palmer*, 468 U.S. 517, 525-26 (1984) (The Fourth Amendment protects only those privacy expectations that are "legitimate."); *Von Raab*, 489 U.S. at 671 ("operational realities" may diminish privacy expectations, and courts may take into account this diminution when assessing reasonableness). Every state has mandatory reporting laws requiring certain individuals to report instances of suspected child abuse. Forty-six states specifically require school teachers to report to law enforcement or to child–protective agencies any suspected child abuse.[5] Many states also either require or permit child abuse investigations to take place at the child's school. For instance, Oregon law permits child–abuse

---

[5] The remaining states simply require every individual who suspects child abuse to report it to the appropriate authorities.

investigations to take place on school premises, so long as the law enforcement officer or child–protective caseworker first notifies the school administrator. Or. Rev. Stat. § 419B.045 (2009). Kansas law provides that "[t]he secretary and law enforcement agencies *shall have access to a child* in a setting designated by school personnel on the premises of an educational institution." Kan. Stat. Ann. § 38-2226(g)(1) (2010) (emphasis added). Michigan requires that "[a] school or other institution shall cooperate with the department during an investigation of a report of child abuse or neglect. Cooperation includes allowing access to the child without parental consent if access is determined by the department to be necessary to complete the investigation or to prevent abuse or neglect of the child." Mich. Comp. Laws Ann. § 722.628(8) (West 2010).

Those statutes further demonstrate that the expectation of privacy of children in school is less than that of adults. Children attending school do so with laws in place that (1) require school personnel to report any suspicions of abuse and (2) permit those investigating such allegations to come to the schools to meet with the child victim. Parents and children thus know that teachers and counselors are responsible for monitoring schoolchildren's health and safety, that if indications of abuse are present, they will be reported, and that in some cases, those charged with investigating reports of child abuse will come to the school to interview the child.

In stark contrast to a child's reduced right of privacy in school stands the government's extraordinary

interest in protecting children against abuse and doing so in ways that minimize trauma for the victim, while at the same time maintaining the integrity of the investigatory process. Stated another way, the government interests in investigating allegations of suspected child abuse are so substantial and compelling that, when compared to a child's limited privacy interest while in school, a warrantless seizure satisfies the Fourth Amendment reasonableness mandate. This Court should thus conclude that seizures to investigate an allegation of child abuse by talking with the child at her school are constitutional at their inception.

3. The Ninth Circuit refused to consider—as the Fourth Amendment requires—the "reasonableness" of the seizure, instead focusing on the government's failure to satisfy the "special-needs" rule.

Rather than considering the seizure at issue in light of the foregoing principles, however, the Ninth Circuit determined that because the government officials had not obtained a warrant or demonstrated that the seizure was justified under the "special-needs" rule, the seizure was unconstitutional. In one sense, the Ninth Circuit is correct that special needs can, in certain circumstances, justify a warrantless seizure. Scholars routinely point to Justice Blackmun's concurrence in *T.L.O.* as the genesis for the special-needs exception to the warrant requirement. *See, e.g.*, Derek Regensburger, *DNA Databases and the Fourth Amendment: The Time Has Come to Reexamine the Special Needs Exception to the Warrant Re-*

quirement and the Primary Purpose Test, 19 Alb. L.J. Sci. & Tech. 319, 349-54 (2009) (explaining history of special needs doctrine). Citing to the balancing test employed in both *Terry* and *Camara*, this Court in *T.L.O.* balanced the students' individual privacy rights against "the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds." *T.L.O.*, 469 U.S. at 339-40. From that balancing, this Court reasoned that the "warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *Id.* at 340. And because of the competing interests and the fact that the warrant requirement would likely "'frustrate the governmental purpose behind the search,'" this Court concluded that school officials need not obtain a warrant before searching a student. *Id.* (quoting *Camara*, 387 U.S. at 532-33).

Seeking to limit the instances in which the Court resorted to this balancing of interests, Justice Blackmun in *T.L.O.* articulated what has become known as the "special needs doctrine": "Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers." *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring). In applying that exception, however, this Court has focused less on the nature of the "special need" and more on whether there

is a "law enforcement" purpose to the "special need" at issue. *See, e.g.*, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (holding search unconstitutional because of overarching law-enforcement purpose); *Vernonia*, 515 U.S. at 652-65 (focusing on non-law-enforcement character of intrusion and holding search constitutional); *see also* Regensburger, *DNA Databases and the Fourth Amendment*, *supra*, at 350-53; Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of A Child Welfare Exception to the Fourth Amendment*, 47 Wm. & Mary L. Rev. 413, 467 n.162 (2005) (noting this Court's application of special-needs doctrine to a wide range of activities, many of which have characterized the governmental interest at issue as simply being "important" or "substantial," and citing *New York v. Burger*, 482 U.S. 691 (1987), and *Chandler v. Miller*, 520 U.S. 305 (1997)).

Accordingly, whether there is a law-enforcement purpose to the "special need" at issue has become the hallmark of the special-needs doctrine and largely dictates whether this Court will hold constitutional a particular search or seizure. *See, e.g.*, *Ferguson*, 532 U.S. 67 (holding search unconstitutional because of overarching law-enforcement purpose); *Vernonia*, 515 U.S. at 652-53, 658 (focusing on non-law-enforcement character of intrusion); *Skinner*, 489 U.S. at 619, 621 n.5 (same). The Ninth Circuit determined that, because a law-enforcement officer was involved in the interview at issue here, and because of the potential for criminal charges against a third party, the special-needs exception did not apply.

But in narrowly focusing on the special-needs doctrine, what the Ninth Circuit overlooked is that searches or seizures justified by special needs are but one type of warrantless seizure in which the reasonableness of the seizure is assessed by balancing the various interests involved. The special-needs rule in no way encompasses or delineates the entire world of constitutional warrantless seizures. Indeed, the majority of the "special-needs" cases involve programmatic searches or seizures that are entirely suspicionless but that typically generate self-incriminating evidence. *E.g.*, *Earls*, 536 U.S. 822, *Ferguson*, 532 U.S. 67. The extent to which a law-enforcement component may transform what is otherwise a "special need"—or strictly non-law-enforcement purpose—into something more akin to a criminal investigation is thus carefully limited. *E.g.*, *Ferguson*, 532 U.S. at 82-84.

However, where the potential for self-incrimination is minimal or unlikely—as it is here, where state officials are interviewing a potential child victim of a crime—a seizure's "entanglement with law enforcement" is an irrelevant inquiry. *See, e.g.*, *Lidster*, 540 U.S. at 424-25 ("Like certain other forms of police activity, say, crowd control or public safety, an information-seeking stop is not the kind of event that involves suspicion, or lack of suspicion, of the relevant individual."); *Burger*, 482 US at 713-16 (upholding constitutionality of regulatory search scheme notwithstanding the fact that, "in the course of enforcing it, an inspecting officer may discover evidence of crimes, besides violations of the scheme itself"). The seizure simply is not effected in order to obtain self-

incriminating evidence. Accordingly, any law-enforcement involvement cannot automatically render the seizure unconstitutional. This Court should thus reject the Ninth Circuit's narrow focus on the special-needs doctrine, and instead apply the reasonableness test that the Fourth Amendment mandates.

C. The Ninth Circuit correctly concluded that the scope of the seizure was not so clearly unreasonable as to preclude qualified immunity and that holding is not before this Court.

Having established that seizures of this sort are reasonable at their inception, this Court would traditionally turn its focus to whether the interview conducted here was also reasonable in its scope. *Terry*, 392 U.S. at 20, 28 (because the Fourth Amendment "proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation[,]" balancing involves a dual reasonableness inquiry: "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."). But because the Ninth Circuit concluded that the interview was unconstitutional in the absence of a warrant, it did not address whether the seizure was reasonable in its scope, concluding only that the scope of the seizure was not so unreasonable as to preclude qualified immunity. And because the Ninth Circuit did not address the reasonableness of the scope of the interview, this Court also need not address the reasonableness of the scope of the interview.

In contrast to the relatively straightforward question concerning the constitutional standard required to justify the initial in-school seizure of a suspected child-abuse victim, the reasonableness of the scope of that seizure presents a "'kaleidoscopic set of facts'" that create "'a classic genuine issue of material fact.'" *Greene*, 588 F.3d at 1021-22 (quoting *Mueller v. Auker*, 576 F.3d 979, 994 (9th Cir. 2009)). Stated differently, the constitutionality of the seizure—that is, the reasonableness of the scope of the seizure—ultimately depends on the resolution of heavily disputed facts by the trier of fact. Because Camreta is entitled to qualified immunity, that resolution should not occur in this case.

This Court recently noted that in cases "in which the constitutional question is so fact-bound," the decision will often provide "little guidance for future cases," and, as a result, those cases "often fail to make a meaningful contribution to" the development of constitutional precedent. *Pearson v. Callahan*, __U.S.__, 129 S. Ct. 808, 819 (2009) (citing *Scott v. Harris*, 550 U.S. 372, 388 (2007) (Breyer, J., concurring) (counseling against the *Saucier* two-step protocol where the question is "so fact dependent that the result will be confusion rather than clarity") and *Buchanan v. Maine*, 469 F.3d 158, 168 (1st Cir. 2006) ("We do not think the law elaboration purpose will be well served here, where the Fourth Amendment inquiry involves a reasonableness question which is highly idiosyncratic and heavily dependent on the facts.")). That reasoning applies with equal force to the issue whether the interview of S.G. was reasona-

bly related in scope to the circumstances justifying the interference in the first place.

The Ninth Circuit noted that, assuming Camreta conducted the interview in the manner S.G. testified to in her affidavit, the reasonableness of the scope of the seizure is a close question. *Greene*, 588 F.3d at 1032-33. But, "mindful of the difficult task facing social services caseworkers, who are required to exercise significant discretion in determining whether a child's welfare is in jeopardy," the court concluded that the scope of the seizure was not so clearly unreasonable as to preclude qualified immunity. *Id.* at 1033. That ruling is correct, and Greene does not challenge it before this Court. And because Camreta is entitled to qualified immunity, this Court need not address the reasonableness of the scope of the seizure. Suffice it to say that, in determining the reasonableness of the scope of such a seizure, courts necessarily must take into account the unique challenges in interviewing a child about potential sexual abuse and that such interviews may justifiably take longer than interviews in other contexts. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) ("A child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent."). But the precise "limitations which the Fourth Amendment places upon" an in-school interview of a suspected victim of child abuse "will have to be developed in the concrete factual circumstances of individual cases." *Terry*, 392 U.S. at 29. This Court need not define those precise limitations in this case, and should instead leave that task

to future cases in which resolution of the issue defines the outcome of the case.

D. Because the State is bound by the Ninth Circuit's legal ruling in this and all future cases, the Ninth Circuit's judgment in favor of the state on qualified immunity grounds does not preclude this Court from reaching the legal issue presented.

The State recognizes, as it did in its petition for a writ of certiorari, that because the Ninth Circuit ruled that petitioner is entitled to qualified immunity, the State received a favorable judgment. The State also recognized in its petition for a writ of certiorari that, with few exceptions, this Court will not grant certiorari when the petitioner prevailed in the court below. *See Bunting v. Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, J., dissenting from the denial of certiorari) ("[O]ur practice reflects a settled refusal to entertain an appeal by a party" who prevailed below) (quotations omitted)). Because this Court granted the petition for a writ of certiorari, it may already have concluded—at least preliminarily—that the finding of qualified immunity does not prevent this Court from having jurisdiction to consider the legal issue. However, and to the extent that this question remains an open one, the State briefly explains why this Court should address the merits of the legal issue, notwithstanding the fact that the state prevailed on qualified immunity grounds.

This Court recently relieved lower courts of the obligation to adhere rigidly to the rule announced in *Saucier v. Katz*, 533 U.S. 194 (2001). Under *Saucier*,

courts first had to decide whether a plaintiff's allegations made out a constitutional violation, and only then were permitted to decide whether the right was nonetheless not "clearly established" and whether qualified immunity thus protected the defendant. *Pearson*, 129 S. Ct. at 815-16 (describing the *Saucier* standard). But in *Pearson*, this Court recognized that adherence to that rule

> may make it hard for affected parties to obtain appellate review of constitutional decisions that may have a serious prospective effect on their operations. Where a court holds that a defendant committed a constitutional violation but that the violation was not clearly established, the defendant may face a difficult situation. As the winning party, the defendant's right to appeal the adverse holding on the constitutional question may be contested.

Id. at 820; *see also Bunting*, 541 U.S. at 1023-24 (Scalia, J., dissenting) (A "favorable judgment on qualified-immunity grounds would deprive a party of an opportunity to appeal the unfavorable (and often more significant) constitutional determination. That constitutional determination is *not* mere dictum in the ordinary sense, since the whole reason we require it to be set forth (despite the availability of qualified immunity) is to clarify the law and thus make unavailable repeated claims of qualified immunity in future cases.") (emphasis in original). This Court then recognized the "unenviable choice" that "prevailing" parties in those circumstances must then comply with the lower court's ruling or defy that ruling and risk

new lawsuits and potential punitive damages. *Pearson*, 129 S. Ct. at 820.

In an attempt to remedy that difficulty, this Court in *Pearson* determined that lower courts "should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Id.* at 818. This Court nevertheless "continue[d] to recognize that [the *Saucier* protocol] is often beneficial." *Id.*

Under *Pearson*, the Ninth Circuit thus did not have to address the constitutional issue because it ultimately ruled in petitioners' favor on qualified immunity grounds. But the Ninth Circuit nevertheless took care to note this Court's advice that the *Saucier* two-step process often "'promotes the development of constitutional precedent'" and—because it had never ruled on the constitutional question presented in this case—it chose to do so to provide guidance "to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment." *Greene*, 588 F.3d. at 1021-22 (quoting *Pearson*, 129 S. Ct. at 818). That decision now stands as precedent that governs how government officials may conduct child-abuse investigations in the nation's largest circuit. The State of Oregon—which appears on Camreta's behalf here[6]—is bound by the Ninth Circuit's

---

[6] Oregon law requires public bodies—including the State—to indemnify their officers, employees and agents against tort and other claims arising out of the individual's performance of duty. Or. Rev. Stat. § 30.285 (2009). This

constitutional ruling in future cases. Absent the ability to seek further review in this case, it must either comply with what it believes to be an erroneous decision or continue interviewing potential child-abuse victims and incur significant liability in the process.

So framed, the Ninth Circuit's Fourth Amendment declaration is not "mere dictum" unreviewable by this court. *Bunting*, 541 U.S. at 1023 (Scalia, J., dissenting). The State should thus be entitled to obtain review of that ruling, to avoid being forced to "'defly] the views of the lower court, adher[e] to practices that have been declared illegal, and thus invit[e] new suits' and potential 'punitive damages.'" *Pearson*, 129 S. Ct. at 820 (quoting *Horne v. Coughlin*, 191 F.3d 244, 247-48 (2d Cir. 1999)). The Ninth Circuit's qualified immunity ruling thus should not preclude review of its Fourth Amendment holding.

CONCLUSION

In concluding that government officials were required to obtain a warrant before interviewing a child at her public school to determine whether her father was sexually abusing her, the Ninth Circuit misapplied the fundamental Fourth Amendment principle that every seizure be "reasonable." This Court should reverse the Ninth Circuit's holding, and instead apply the balancing test that the Fourth Amendment mandates where the seizure is less intrusive than that involved in a traditional arrest and when its purpose is to prevent or investigate a harm. Using that balanc-

---

duty to indemnify extends to claims based on 42 U.S.C. § 1983 (2006). 44 Op. Att'y Gen. 416, 422-27 (Or. 1985).

ing test, this Court also should conclude that the interview of the child at her school to determine whether she was the victim of sexual abuse was reasonable at its inception.

Respectfully submitted,

JOHN R. KROGER
Attorney General of Oregon
MARY H. WILLIAMS
Solicitor General
ANNA JOYCE
Deputy Solicitor General
Counsel for Bob Camreta

Consolidated Case Nos. 09-1478 and 09-1454

In The
Supreme Court of the United States

JAMES ALFORD,
DESCHUTES COUNTY DEPUTY SHERIFF,

Petitioner,

v.

SARAH GREENE, personally and as
next friend for S.G., a minor, and K.G., a minor,

Respondents.

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, personally and as
next friend for S.G., a minor, and K.G., a minor,

Respondents.

**On Writs Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

BRIEF FOR PETITIONER JAMES ALFORD

CHRISTOPHER DENNIS BELL
Counsel of Record
Assistant Legal Counsel
STEVEN EDWARD GRIFFIN
Assistant Legal Counsel
OFFICE OF DESCHUTES COUNTY LEGAL COUNSEL
1300 NW Wall Street, Suite 205
Bend, OR 97701
541-388-6624
christopher_bell@co.deschutes.or.us
steven_griffin@co.deschutes.or.us

Attorneys for Petitioner
Deschutes County Deputy Sheriff James Alford

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the Fourth Amendment require a warrant, court order, parental consent, or exigent circumstances before law enforcement and child welfare officials may conduct a temporary seizure and interview at a public school of a child whom they reasonably suspect was being sexually abused by her father?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
I. Proceedings Below	2
II. Statement of Facts	5
SUMMARY OF ARGUMENT	10
ARGUMENT	13
I. The Fourth Amendment Requires a Seizure to be Judged Using "Traditional Standards of Reasonableness"	13
A. The Court Should Use "Traditional Standards of Reasonableness" to Judge the Interview of S.G. by Balancing Her Expectations of Privacy Against the Government's Interest in Protecting Her from Abuse	14
B. This Court's Modern, Two-Step Approach to Analyze Fourth Amendment Questions	16
1. The Historical Record of the Founding Era Provides "No Clear Answer" as to Whether the Framers Sought to Protect Children from Interviews Like S.G.'s When They Adopted the Bill of Rights	17

TABLE OF CONTENTS – Continued

Page

2. When History is Not Clear, "Traditional Standards of Reasonableness" Govern, Not the "General Law of Search Warrants" 21

C. *Illinois v. Lidster* 23

D. "Special Needs" 25

1. What Constitutes a "Special Need"? ... 26

2. "Special Needs" Govern the Seizure at Issue Here 28

E. An Identical "Traditional Reasonableness" Standard Applies to All Three Modes of Analysis 33

II. "Traditional Standards of Reasonableness" Demonstrate that S.G.'s Interview Was Reasonable 35

A. Seizures of this Type are Reasonable Because They Serve the Broad and Weighty Public Interest of Protecting Children from the Harmful Effects of Abuse 36

B. Seizures of this Type are Reasonable Because They Substantially Advance the Public's Interest in Protecting Children from the Harmful Effects of Abuse 39

TABLE OF CONTENTS – Continued

Page

1. The Public Interest in Child Protection is Advanced by a System of Coordinated Investigations and Early, Face-to-Face Interviews With Suspected Victims Conducted Away from Potential Undue Influence 40

2. The Public's Interest in Child Protection Would be Impeded by a Warrant Requirement for Seizures of this Type 43

3. The Public's Interest in Child Protection Would be Impeded by a Probable Cause Requirement for Seizures of this Type 46

C. Seizures of this Type are Reasonable Because They Minimally Intrude on a Child's Privacy Interests 49

1. Children, and Even More So Children Who Attend Public School, Have a Lesser Expectation of Privacy Than Does the General Public 50

2. The Means by Which Seizures of this Type are Accomplished are Not Seriously Invasive 53

TABLE OF CONTENTS – Continued

Page

III. **The Court Should Adopt a Standard Similar to *T.L.O.*, Which Would Permit Child Protection Caseworkers and Law Enforcement Officers With Reasonable Suspicion of Abuse to Seize a Child for an Interview. Such a Standard Would Ensure Such Seizures are Reasonable in Scope and Protect the Interests of the Child** 61

CONCLUSION 64

TABLE OF AUTHORITIES

Page

Cases

Adams v. Williams, 407 U.S. 143 (1972).....58

Atwater v. City of Lago Vista, 532 U.S. 318 (2001).....20, 21, 22, 34

Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833).....17

Bd. of Ed. of Ind. Sch. Dist. No. 92 of Pottawatomie Co. v. Earls, 536 U.S. 822 (2002).....*passim*

Brown v. Texas, 443 U.S. 47 (1979).....35

Chandler v. Miller, 520 U.S. 305 (1997)...26, 27, 28, 32

City of Indianapolis v. Edmond, 531 U.S. 32 (2000).....23

County of Riverside v. McLaughlin, 500 U.S. 44 (1991).....20, 22

Couture v. Bd. of Educ. of Albuquerque Pub. Schs., 535 F.3d 1243 (10th Cir. 2008).....56

Doe v. Bagan, 41 F.3d 571 (10th Cir. 1994).....3

Dunaway v. New York, 442 U.S. 200 (1979).....13

Ferguson v. City of Charlotte, 532 U.S. 67 (2001).....*passim*

Fontain v. Ravenel, 58 U.S. 369 (1854).....18

Gates v. Texas Dept. of Protective and Regulatory Services, 537 F.3d 404 (5th Cir. 2008).....51, 52, 53, 54

Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982).....28

TABLE OF AUTHORITIES – Continued

Page

Greene v. Alford, 588 F.3d 1011 (9th Cir. 2009).....1

Greene v. Alford, CIV. 05-6047-AA, 2006 WL 758547 (D. Or. Mar. 23, 2006).....1

Griffin v. Wisconsin, 483 U.S. 868 (1987).....*passim*

Illinois v. Lidster, 540 U.S. 419 (2004).....*passim*

I.N.S. v. Delgado, 466 U.S. 210 (1984).....55

Johnson v. State, 21 Tenn. 283 (1840).....19

Kazery v. State, 995 So.2d 827 (Miss. App. 2008).....42

King v. Brockway, 2 Root 86 (Conn. Super. Ct. 1794).....20

Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990).....38, 39, 40, 43

Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).....26, 34

New Jersey v. T.L.O., 469 U.S. 325 (1985).....*passim*

New York v. Burger, 482 U.S. 691 (1987) ...38, 39, 44, 46

New York v. Ferber, 458 U.S. 747 (1982).....28

O'Connor v. Ortega, 480 U.S. 709 (1987).....46

Payton v. New York, 445 U.S. 573 (1980).....17, 55

Pennsylvania v. Mimms, 434 U.S. 106 (1977).....13

Prince v. Massachusetts, 321 U.S. 158 (1944).....29

Schermerhorn v. Hull, 16 N.Y. (Johns) 270 (N.Y. Sup. Ct. 1816).....19

TABLE OF AUTHORITIES – Continued

Page

Shuman v. Penn Manor Sch. Dist., 422 F.3d 141 (3rd Cir. 2005) 56

Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989) ..... *passim*

State v. Storch, 612 N.E.2d 305 (Ohio 1993) 41

Terry v. Ohio, 392 U.S. 1 (1968) 13, 57, 58, 61, 62

United States v. Butterfly, 182 F.3d 928 (9th Cir. 1999) 41

United States v. Drayton, 536 U.S. 194 (2002) 55

United States v. George, 960 F.2d 97 (9th Cir. 1992) 41

United States v. Knights, 534 U.S. 112 (2001) ..... *passim*

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 38, 46

United States v. Montoya de Hernandez, 473 U.S. 531 (1985) ..... *passim*

United States v. Provost, 969 F.2d 617 (8th Cir. 1992) 41

United States v. Sharpe, 470 U.S. 675 (1985) 56, 57

Vernonia School District 47J v. Acton, 515 U.S. 646 (1995) ..... *passim*

Virginia v. Moore, 553 U.S. 164 (2008) ..... *passim*

Warner v. Swett, 7 Vt. 446 (1835) 19

Wofford v. Evans, 390 F.3d 318 (4th Cir. 2004) 56

Wyman v. James, 400 U.S. 309 (1971) 29

Wyoming v. Houghton, 526 U.S. 295 (1999) 16, 21, 22

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1331 1
Or. Rev. Stat. § 419B.005(1)(a)(B) 45
Or. Rev. Stat. § 419B.010 (2001) 30
Or. Rev. Stat. § 418.747(5) 31, 32, 63
Or. Rev. Stat. § 419B.015 30
Or. Rev. Stat. § 419B.020(1)(a) 30
Or. Rev. Stat. § 419B.020(2) 31
Or. Rev. Stat. § 419B.035(1) and (2) 31
Or. Rev. Stat. § 419B.045 (2001) 8
Or. Rev. Stat. § 419B.175 31
Or. Rev. Stat. § 419B.185(1) 31
Or. Rev. Stat. § 418.747 42
Or. Rev. Stat. § 418.783 42
Or. Rev. Stat. § 418.784 42
Or. Rev. Stat. Ch. 419B 63

RULES

Or. Admin. R. 413-020-0430(5)(h) (2002) 8

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV ..... *passim*
U.S. Const. amend. XIV 13

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

1 W. Blackstone, *Commentaries on the Laws of England*, Ch. 17, 463 (1765) 18

Am.Jur.2d, *Parent and Child* § 10 (1987) 50

Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1037, n. 182 (1992) (quoting Michael Grossberg, GOVERNING THE HEALTH LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA 54 (1985)) 18

Eric Shelman and Stephen Lazoritz, M.D., THE MARY ELLEN WILSON CHILD ABUSE CASE AND THE BEGINNING OF CHILDREN'S RIGHTS IN 19TH CENTURY AMERICA, McFarland & Company (2005) 18

Frederick S. Cohen and Judianne Densen-Gerber, *A Study of the Relationship Between Child Abuse and Drug Addiction in 178 Patients: Preliminary Results*, 6 CHILD ABUSE AND NEGLECT 383-87 (1982) 36

How One Girl's Plight Started the Child Protection Movement, American Humane Association, (http://www.americanhumane.org/about-us/who-we-are/history/mary-ellen.html) viewed December 6, 2010 (citing Sallie A. Watkins, *The Mary Ellen Myth: Correcting Child Welfare History* 35 SOCIAL WORK 500 (1990) 19

TABLE OF AUTHORITIES – Continued

Page

Howard Markel, *Case Shined First Light on Abuse of Children*, NEW YORK TIMES (December 14, 2009) 19

Jeffery B. Bryer, et al., *Childhood Sexual and Physical Abuse as Factors in Adult Psychiatric Illness*, 144 AM. J. PSYCHIATRY 1426, 1430 (1987) 36

Elaine Carmen, et al., *Victims of Violence and Psychiatric Illness*, 141 AM. J. PSYCHIATRY 378 (1984) 36

John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 452-53 (2008) 17

John E.B. Myers, *The Legal Response to Child Abuse: In the Best Interest of the Children?*, 24 J. FAM. L. 149, 182-84 (1985) 42

Lindsay Malloy, M.A., Thomas D. Lyon, J.D., and Jodi Quas, Ph.D., *Filial Dependency and Recantation of Child Sexual Abuse Allegations*, 46 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 162, 163, 166 (Feb. 2007) 41

Dara Loren Steele, Note, *Expert Testimony: Seeking an Appropriate Admissibility Standard for Behavioral Science in Child Sex Abuse Prosecutions*, 48 DUKE L.J. 933, 938-39 (1999) 41

TABLE OF AUTHORITIES – Continued

Page

Moore v. Ganim, 660 A.2d 742, 810 (Conn. 1995) (quoting LAWS OF HIS MAJESTY'S COLONY IN CONNECTICUT IN NEW ENGLAND (B. Green & J. Allen pubs. 1702) pp. 94-95) 19

Shanta R. Dube, et al., *Long-Term Consequences of Childhood Sexual Abuse by Gender of Victim*, 28 AM. J. PREV. MED. 430, 434 (2005) 36

U.S. Dept. of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau (2010). *Child Maltreatment 2008* at 6. Available at http://www.acf.hhs.gov/programs/cb/stats_research/index.htm#can 29

William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States*, 31 U. RICH. L. REV. 111, 121 (1997) 19

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is published at *Greene v. Alford*, 588 F.3d 1011 (9th Cir. 2009) and is reprinted in the Appendix to the Petition for a Writ of Certiorari at 1. The decision of the District Court is unpublished. It can be retrieved at *Greene v. Alford*, CIV. 05-6047-AA, 2006 WL 758547 (D. Or. Mar. 23, 2006) and is reprinted in the appendix to the petition at 56.

JURISDICTION

The Ninth Circuit issued its opinion on December 10, 2009. Petitioner, having previously received an extension of time within which to file, timely filed a petition for rehearing/rehearing *en banc* on February 4, 2010 which the Ninth Circuit denied on March 1, 2010.

The petition for a writ of certiorari was filed on June 1, 2010 and granted on October 12, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1). The District Court had jurisdiction pursuant to 28 U.S.C. § 1331.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

I. Proceedings Below

S.G., nine years old at the time of the underlying events, sued in the United States District Court for the District of Oregon asserting that petitioners Oregon Department of Human Services ("DHS") caseworker Bob Camreta and Deputy Sheriff James Alford ("petitioner") (collectively, "petitioners") had unreasonably seized her at a public school in violation of the Fourth Amendment. (J.A. at 12-31) S.G.'s claim arose from a one to two-hour interview conducted in her school's conference room. (App. to Cert. Pet. at 58) The interview took place after Camreta had received information leading him to suspect S.G.'s father had sexually abused her and her five-year old sister. (App. to Cert. Pet. at 5, 58) The District Court granted petitioners summary judgment, ruling that

although S.G. had been seized, no constitutional violation had occurred because the seizure was reasonable given the circumstances. (App. to Cert. Pet. at 66-67)

The District Court found the analysis in *Doe v. Bagan*, 41 F.3d 571 (10th Cir. 1994) persuasive. (App. to Cert. Pet. at 65) *Bagan* considered whether the seizure of a nine-year old boy by a social services caseworker at a public school to question him about his suspected sexual abuse of another child violated the Fourth Amendment. 41 F.3d at 573-74. Applying the reasonableness test of *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), *Bagan* held no constitutional violation had occurred, as the seizure "was justified at its inception because a victim of child abuse had identified [the boy] as her abuser," and "a ten-minute interview with a caseworker was reasonably related in scope to determining [the boy]'s role in the incident." 41 F.3d at 574 n. 3.

Applying the same standard to the present case, the District Court concluded the seizure of S.G. was reasonable at its inception because it was supported by reasonable suspicion that S.G. had been sexually abused by her father, and was reasonable in scope because the circumstances justified the interview's length. (App. to Cert. Pet. at 65) The District Court ruled alternatively that, even if the seizure had been unconstitutional, qualified immunity protected petitioners from liability. *Id.* at 66.

On appeal the Ninth Circuit rejected the District Court's reasoning on the Fourth Amendment issue, but agreed with its qualified immunity ruling. (App. to Cert. Pet. at 44-45) Accordingly, it affirmed the District Court as to its grant of summary judgment to petitioners, but reversed the District Court's ruling as to the Fourth Amendment violation. (App. to Cert. Pet. at 55) Petitioners' appeal only challenges the Ninth Circuit's substantive Fourth Amendment analysis, not the issue of qualified immunity.[1]

The Ninth Circuit relied on *Ferguson v. City of Charlotte*, 532 U.S. 67 (2001) to conclude the standard employed by the District Court cannot apply to in-school child abuse interviews conducted with law enforcement involvement. (App. to Cert. Pet. at 30-36) The panel reasoned that *Ferguson* barred the application of the *T.L.O.* standard where "law enforcement personnel or purposes" are too deeply involved in a seizure. *Id.* Thus, rather than balancing the government's interests in the interview against S.G.'s expectations of privacy, it held "the general law of search warrants applies to child abuse investigations" where law enforcement personnel or purposes are involved. *Id.* at 36-37.

---

[1] The opening brief of petitioner Camreta addresses why the issue of qualified immunity does not preclude this Court's review in this case. The same reasons justifying review of Camreta's appeal apply to Alford's appeal. For this reason, Alford adopts Camreta's arguments in this regard.

II. Statement of Facts

On Thursday, February 20, 2003, Camreta received reports concerning the possible sexual abuse of two girls, S.G., age 9, and her little sister K.G., age 5. The report stated that Nimrod Greene ("Nimrod") had been arrested February 12, 2003, on charges that he had sexually abused a seven-year old boy referred to as F.S. The report described the circumstances of Nimrod's arrest and reported possible sexual abuse by Nimrod against his two daughters, S.G. and K.G. (Camreta Aff., p. 2, and exhibits 2 and 3, District Court Docket #44 (J.A. 2))

The reports stated that police had been called to F.S.' family home to investigate statements he had made to his parents concerning Nimrod. Detectives interviewed F.S. and his parents. F.S., in substance, told detectives that he was alone with Nimrod earlier that day and that Nimrod had grabbed or squeezed his "pee pee" while he was sitting on the chair in the living room.

F.S.' parents corroborated that Nimrod had indeed been at their home that day and that he and F.S. were alone together in the living room while they were occupied with other guests. F.S. came out of the living room and approached his mother and asked to speak with her. Nimrod, who appeared intoxicated, attempted to prevent F.S. from speaking with his mother. Seeing that his presence upset her son, F.S.' mother told Nimrod to "back off," and Nimrod left shortly thereafter. Sometime after Nimrod left, F.S.

told his parents that while in the living room Nimrod had grabbed or squeezed his "pee pee" while he was sitting on the chair in the living room and that he didn't like it, he didn't want Nimrod to do it again, and that a similar encounter had happened in the past. *Id.*

During the investigation, F.S.' parents also told the detective how both Nimrod and his wife, Sarah Greene, had made comments in the past suggesting that Nimrod had sexually abused their daughters. For instance, Nimrod had told F.S.' father that Sarah had accused him of molesting his daughters. F.S.' parents said they had no firsthand knowledge of actual abuse, but told the detective that similar comments had been made in the past by both Nimrod and Sarah. *Id.*

F.S.' mother also told the detective that Sarah was afraid of Nimrod. She mentioned that Sarah had confided to her about how she didn't like the way Nimrod makes the girls sleep in his bed when he is intoxicated, and didn't like the way he acts when they are sitting on his lap. Many of Sarah's complaints about Nimrod concerned his actions while intoxicated. *Id.*

The reports also stated that when detectives questioned Nimrod regarding F.S., Nimrod became "very nervous and started sweating." When Nimrod was informed that F.S. had told his parents Nimrod had touched him on his privates, he became extremely nervous, "laughed nervously, waved his

hands, would stand up and sit down, sweat, wring his hands, and fidget." The report noted that Nimrod was so nervous that the detective questioning him "could see his pulse in his neck." Nimrod agreed to meet the detective at the Sheriff's Office to answer questions. Nimrod failed to appear at the time agreed for the interview. *Id.*

The day after receiving the initial report, Camreta learned Nimrod had been released on bail from custody following his arrest and was having unsupervised contact with his daughters. Based on his experience and training, Camreta knew that child sex offenders often act on impulse and often direct those impulses against their own children. He also knew that S.G., K.G., and Nimrod continued to live with S.G.'s and K.G.'s mother, Sarah Greene, who based on the reports from the investigation into what had happened to F.S., apparently knew that Nimrod had been abusing S.G. and K.G. and had done nothing. (Camreta Aff., p. 2, and exhibits 2 and 3, District Court Docket #44 (J.A. 2))

On Monday, February 24, 2003, Camreta began a child protective services assessment concerning S.G. and K.G. Camreta knew where S.G. attended school and that school was in session. Believing the school was an appropriate environment to help make S.G. feel safe, and desiring to conduct the interview away from the influence of her parents or other potential distractions, Camreta decided to interview S.G. at her

school that day. He did not contact S.G.'s parents before conducting the interview.[2] In-school interviews of this type are a regular practice of child protective workers such as Camreta and are consistent with DHS rules and training. Camreta requested the assistance of the Deschutes County Sheriff's Office, and petitioner was dispatched to the school. (Camreta Aff., pp. 2-4, District Court Docket #44 (J.A. 2); (Christopher Bell Aff., exhibit 1, pp. 3-4) (Excerpts from the Deposition Transcript of James Alford); District Court Docket #49 (J.A. 3))

Upon arriving at the school, petitioners notified the administration they were there and received permission to interview S.G. at school. A counselor went to S.G.'s class, retrieved her and brought her to a large conference room adjacent to the school's administrative offices, where petitioners were waiting. The two were introduced to S.G. and the counselor

---

[2] Oregon law permits child abuse assessments to occur on public school grounds and does not always require advance notice to the parents. *See* Or. Rev. Stat. § 419B.045 (2001) (requiring notice to the school administrator, but not to a child's parents) and Or. Admin. R. 413-020-0430(5)(h) (2002). The statutes and regulations at issue in this case have undergone revisions since these events occurred. The 2001 compilation of the Oregon Revised Statutes contains the versions in effect at all times material to the events at issue herein. Some of the statutes at issue were amended in 2003, but those amendments were not effective on the date of these incidents. The 2002 Oregon Administrative Rules compilation contains the versions of the rules in effect at the time of S.G.'s interview. The 2003 amendments to the rules did not take effect until July 2003.

left. (Camreta Aff., pp. 2-4, District Court Docket #44; Christopher Bell Aff., exhibit 1, pp. 5-8; exhibit 2, pp. 2-4) (Excerpts from the Deposition Transcript of S.G.); District Court Docket #49 (J.A. 3)).

Once there, S.G. sat down at a table with Camreta, who asked her questions. Camreta's questions were sensitive to S.G.'s gender and age. According to Camreta, the interview lasted about an hour. S.G. believed it lasted closer to two hours. To make her comfortable Camreta began with light conversation about school, where she had lived in her life, her cats, her family, and homework. Camreta began to discuss S.G.'s father with her, and she disclosed that he had sexually abused her. Camreta documented her admissions in his written report:

> (a) She had heard about "good" and "bad" touches; she knew it was important to tell the truth; (b) "When he drinks he tries to do it," meaning "he tries to touch me somewhere in my private parts. Then I go to my room and lock the door"; (c) The last time this occurred was "just last week" on the outside of her clothing and she had tried to tell him to stop; (d) Her dad stopped the private part touching "yesterday because he isn't going to drink anymore"; (e) The touching of private parts started when she was three; (f) The touching involved the chest and buttock areas, outside of her clothing. Her father sometimes "mumbled during the touching"; (g) S.G.'s mother knew about the touching; her mother had said within the last couple of

days that "she had to deal with my dad"; and
(h) The touching was "one of our secrets," with her little sister, K.G.

(Camreta Aff., pp. 2-4, and Ex. 3, District Court Docket #44 (J.A. 2); Christopher Bell Aff., exhibit 2, pp. 4-6; District Court Docket #49 (J.A. 3))

According to S.G., petitioner "just sat there" during the interview. He did not ask her any questions or otherwise participate. Neither petitioner touched or threatened her. S.G. said petitioner was nice to her, she trusted him, and he never did anything to frighten her. She said it was common for police officers to be present at school and she was comfortable in their presence. Based upon what S.G. had told him, Camreta concluded that she was in need of protective social services and arranged to have services provided to S.G. and her family. (Camreta Aff., pp. 4-8, exhibits 3-12, District Court Docket #44 (J.A. 2); Christopher Bell Aff., exhibit 2, pp. 7, 10, 12, 15-17; District Court Docket #49 (J.A. 3); J.A. 60)

SUMMARY OF ARGUMENT

The government need to protect children from abuse and neglect is compelling. In some contexts actions taken in furtherance of such interests must be tailored narrowly, not so under the Fourth Amendment. The Fourth Amendment requires the government to act reasonably when conducting a search or

seizure. The reasonableness of a seizure is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.

In deciding this case, the Ninth Circuit departed from these established principles. It gave only a passing nod to reasonableness and balancing of interests. Instead, it undertook an analysis of the degree to which the Oregon child welfare statutes evidenced "entanglement of law enforcement and social service officials in the state's investigation of child abuse." (App. to Cert. Pet. at 32) Once the court concluded that the Oregon system "encourag[ed] entanglement between law enforcement and social service workers," balancing was over – the "general law of search warrants" applied. The Ninth Circuit believed this "general law" imposed a rule which required such brief seizures to be justified by a warrant, court order, exigent circumstances or parental consent. (App. to Cert. Pet. at 35)

The decision below is flawed in two important respects. First, the proper analytical framework is to engage in a balancing of the relevant public and private interests at stake, not reflexively imposing a requirement of a warrant or probable cause. The second flaw flows naturally from the first. Had the Ninth Circuit balanced the relevant interests as required, it would have concluded that reasonableness here compels neither a warrant nor probable cause.

The rule announced below serves as a systematic disincentive for police or child welfare officials to act even in cases where to do so would substantially further the public's interest in protecting a child from harm. The rule places responsible officials in an impossible position, particularly in close cases. On the one hand, a warrant or probable cause requirement discourages taking the modest measure of escorting a suspected child abuse victim to a private location and speaking with her about whether she is safe at that very moment. On the other, it encourages hasty and injudicious action to prevent second guessing of the exigency of a particular circumstance. A responsible Fourth Amendment balance weighs in favor of standards which encourage officials to act in the public interest. When one considers that a typical seizure in this type of situation consists of escorting a child to a nearby private location and talking to her it becomes clear that the imposition of a warrant and probable cause requirement do not meaningfully protect either the public or private interests.

Instead of the unworkable, and frankly dangerous, rule announced by the Ninth Circuit, this Court should apply a reasonableness test similar to the one articulated in *New Jersey v. T.L.O.* Under such a test a government official, including a police officer, acts reasonably when he seizes a child whom he reasonably suspects has been abused and is in need of protection. A constitutionally reasonable seizure is no more intrusive than reasonably needed to determine

if the child has been abused or is in need of protection.

ARGUMENT

I. The Fourth Amendment Requires a Seizure to be Judged Using "Traditional Standards of Reasonableness"

The Fourth Amendment to the United States Constitution, as applied to the states as well as local governments through the Fourteenth Amendment, provides that the state shall not violate "[t]he right of the people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures." "As the text of the Fourth Amendment indicates, the ultimate measure of a government search or seizure is 'reasonableness.'" *Vernonia School District 47J v. Acton*, 515 U.S. 646, 652 (1995). Consequently, the touchstone of any analysis under the Fourth Amendment is "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *Terry v. Ohio*, 392 U.S. 1, 19-20 (1968). Such reasonableness ultimately depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *Dunaway v. New York*, 442 U.S. 200, 208-09 (1979) (citing *Terry*, 392 U.S. at 22-27); *Pennsylvania v. Mimms*, 434 U.S. 106, 108-09 (1977).

A. The Court Should Use "Traditional Standards of Reasonableness" to Judge the Interview of S.G. by Balancing Her Expectations of Privacy Against the Government's Interest in Protecting Her from Abuse

Three lines of Supreme Court authority command the seizure here to be evaluated according to a balancing of relevant public and private interests and not by automatically imposing a warrant, court order, exigent circumstances or parental consent requirement.

First, modern practice establishes that the proper Fourth Amendment analysis of *any* challenged search or seizure proceeds in two steps. The first step is a historical one which compels the Court to examine "the statutes and the common law of the Founding Era" and determine if the founders would have regarded the practice as unlawful. *Virginia v. Moore*, 553 U.S. 164, 168 (2008); *Vernonia*, 515 U.S. at 652-53. Where history is inconclusive, the Court proceeds to the second step – "assessing, on the one hand, the degree to which [the government practice] intrudes upon an individual's privacy and, on the other, the degree to which [the intrusion] is needed for the promotion of legitimate governmental interests."[3] *Moore*, 553 U.S. at 171; *Vernonia*, 515 U.S. at 652-53.

---

[3] Such balancing has been referred to by this Court as analyzing searches and seizures under "traditional standards of reasonableness." *See Moore*, 553 U.S. at 171.

This straightforward approach applies regardless of whether a search or seizure is calculated to advance criminal, civil, administrative, special, non-special, or some other combination of governmental interests.

Second, if the modern approach does not compel such a balancing of interests, this Court's 2004 decision in *Illinois v. Lidster*, 540 U.S. 419 (2004) does. *Lidster* holds that seizing a person to discover if he or she is a witness to a crime is fundamentally different than seizing a person to determine if he or she has committed a crime. The Court recognized this proposition to comprise "a valid and important distinction" for Fourth Amendment purposes. *Id.* at 428 (Stevens, J., concurring). Regardless of historical ambiguity, *Lidster* states that seizures of the witness-seeking type are analyzed by balancing the relevant public and private interests at stake. Whether Fourth Amendment reasonableness requires a warrant or probable cause is determined by reference to this balance of interests, not by presumptively requiring either.

Third, if the Court determines *Lidster* does not govern, or that it needs to depart from the modern practice, another body of case law, the "special needs" cases, requires the Court to evaluate S.G.'s seizure under traditional standards of reasonableness. "[W]hen 'special needs,' beyond the normal need for law enforcement," drive the need for a search or seizure, the Court evaluates the practice "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate

government interests" to determine if warrant and probable cause requirements are impracticable. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989).

B. This Court's Modern, Two-Step Approach to Analyze Fourth Amendment Questions

In the first (historical) step of the modern analysis, the Court "look[s] to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve." *Moore*, 553 U.S. at 171. "When history has not provided a conclusive answer," the Court proceeds to the second step, "analyz[ing] a search or seizure in light of traditional standards of reasonableness." *Id.* This analysis involves "assessing, on the one hand, the degree to which [the government practice] intrudes upon an individual's privacy and, on the other, the degree to which [the intrusion] is needed for the promotion of legitimate governmental interests." *Moore*, 553 U.S. at 171; *Wyoming v. Houghton*, 526 U.S. 295, 299 (1999). This approach assesses the Fourth Amendment propriety of the S.G. interview by employing traditional standards of reasonableness.

1. The Historical Record of the Founding Era Provides "No Clear Answer" as to Whether the Framers Sought to Protect Children from Interviews Like S.G.'s When They Adopted the Bill of Rights

"The historical materials on what the Framers thought of official searches of children, let alone of public school children ... are extremely scarce." *Vernonia*, 515 U.S. at 686 n. 1 (O'Connor, J., dissenting). This scarcity is unsurprising – the Bill of Rights did not apply to the states when the Fourth Amendment was adopted. *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833). The Founders adopted the Fourth Amendment out of fear of "indiscriminate searches and seizures conducted under the authority of 'general warrants.'" *Payton v. New York*, 445 U.S. 573, 583 (1980). The states, not the federal government, exercised authority over the welfare of children.[4] Thus, S.G.'s interview does not resemble the abuses prompting the ratification of the Fourth Amendment.

Nonetheless, the power of a state to act in the best interests of vulnerable citizens was well-established at the founding of the Republic. Under the English constitutional system the King, as father of the nation, possessed the power to act in protection

---

[4] John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 452-53 (2008).

of the nation's weak and powerless, namely "infants, idiots, and lunatics."[5] Hence, at the founding of the United States, the power of *parens patriae* was passed to the states to be exercised by their respective legislatures. *Fontain v. Ravenel*, 58 U.S. 369, 384 (1854).

Earlier, during the colonial era, parents essentially owned their children and could generally do with them as they pleased, including using disciplinary methods that would be considered abusive in today's society.[6] This Court has acknowledged that children enjoyed substantially fewer "rights" at the time of the framing, *Vernonia*, 515 U.S. at 665 n. 4, and that compulsory school attendance did not emerge until more than fifty years after adoption of the Fourth Amendment. *Id.* at 653 n. 1. Thus, what children's "rights" are while attending school was surely not contemplated by the Founders when drafting the Fourth Amendment.

In addition, criminal prosecution of child abuse was virtually unknown,[7] and government seizures of

---

[5] 1 W. Blackstone, *Commentaries on the Laws of England*, Ch. 17, 463 (1765).

[6] *See* Barbara Bennett Woodhouse, *"Who Owns the Child?": Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1037 n. 182 (1992) (quoting Michael Grossberg, GOVERNING THE HEALTH LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA 54 (1985)).

[7] The 1874 child abuse trial concerning Mary Ellen Wilson has been popularly regarded as the first recorded case of prosecution of child abuse as a crime. *See* Eric Shelman and Stephen

(Continued on following page)

children to protect them from abuse were accomplished through colonial (and later state) "poor laws."[8] Neglected children of parents who "suffer[ed] their Children to live idly,"[9] were seized and "bound out" as apprentices to more desirable families.[10] Prior judicial approval of these highly invasive, long-term seizures was by no means universal. *Compare Warner v. Swett*, 7 Vt. 446, 450 (1835) (Vermont poor law "conferred a discretionary authority" on town overseers to bind out children without prior judicial approval); *Schermerhorn v. Hull*, 16 N.Y. (Johns) 270 (N.Y. Sup. Ct. 1816) (overseer not required to obtain prior judicial approval before binding out father's child); *with*

Lazoritz, M.D., THE MARY ELLEN WILSON CHILD ABUSE CASE AND THE BEGINNING OF CHILDREN'S RIGHTS IN 19TH CENTURY AMERICA, McFarland & Company (2005); Howard Markel, *Case Shined First Light on Abuse of Children*, NEW YORK TIMES (December 14, 2009); *How One Girl's Plight Started the Child Protection Movement*, American Humane Association, (available at http://www.americanhumane.org/about-us/who-we-are/history/mary-ellen.html) viewed December 6, 2010 (citing Sallie A. Watkins, *The Mary Ellen Myth: Correcting Child Welfare History* 35 SOCIAL WORK 500 (1990)). The case of Mary Ellen Wilson may not have been the first child abuse case prosecuted as a crime, as a prior case involving the apparent prosecution of a child's parents on allegations they "excessively punished" their child occurred 34 years earlier. *Johnson v. State*, 21 Tenn. 283 (1840).

[8] *See* William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States*, 31 U. RICH. L. REV. 111, 121 (1997) (hereafter *Reluctant Charity*).

[9] *Moore v. Ganim*, 660 A.2d 742, 810 (Conn. 1995) (quoting LAWS OF HIS MAJESTY'S COLONY IN CONNECTICUT IN NEW ENGLAND (B. Green & J. Allen pubs. 1702) pp. 94-95).

[10] *Reluctant Charity* at 153.

King v. Brockway, 2 Root 86, 86 (Conn. Super. Ct. 1794) (magisterial consent required before seizure and indenture of neglected child). Here, as in *Vernonia* "there was no clear practice, either approving or disapproving the type of [seizure] at issue at the time" the Fourth Amendment was adopted. 515 U.S. at 652.

Given this record, Justice O'Connor's observation in *Vernonia* concerning the scarcity of founding era materials on official searches of children extends to official seizures of children. What is certain is that existing historical sources emphatically do not "point to a 'clear answer [that] existed in 1791 and has been generally adhered to by the traditions of our society ever since.'" *Atwater v. City of Lago Vista*, 532 U.S. 318, 345 (2001) (quoting *County of Riverside v. McLaughlin*, 500 U.S. 44, 60 (1991) (Scalia, J., dissenting)). If anything, the American norm permitted severely invasive and prolonged seizures of children undertaken for their welfare on little evidence and with scant judicial oversight. Thus, this unclear history demands that the question presented by this case be resolved using "traditional standards of reasonableness." *Moore*, 553 U.S. at 171.

2. When History is Not Clear, "Traditional Standards of Reasonableness" Govern, Not the "General Law of Search Warrants"

Three decisions from this Court demonstrate the Ninth Circuit erred when it failed to assess the reasonableness of S.G.'s interview with a balancing of interests approach. Instead, it reviewed the Oregon statutory scheme governing the interview at issue, and concluded it "encourage[d] entanglement between law enforcement and social service workers." (App. to Pet. for Cert. at 35) After that determination, no balancing took place, and the so-called "general law of search warrants" governed. *Id.* This was the wrong approach.

Virginia v. Moore, *Atwater v. City of Lago Vista*, and *Wyoming v. Houghton* each counsel against reflexively imposing a warrant or probable cause requirement when police are "entangled" in a search or seizure. In each case police officers performed the Fourth Amendment intrusion solely in furtherance of the state's general interest in law enforcement. *Moore* involved police conducting a warrantless arrest and incidental search. 553 U.S. at 166. *Atwater* also concerned a challenge to the police's authority to make a warrantless arrest. 532 U.S. at 323. *Houghton* implicated a warrantless search of an automobile passenger's belongings when probable cause existed to search the automobile, but not the passenger's belongings. 526 U.S. at 303.

The Court trod the same decisional path in each case. First, it conducted a historical analysis of the challenged actions. When it found the historical record evidence of a warrant or probable cause requirement "equivocal,"[11] not providing a "clear answer,"[12] or inconclusive,[13] it evaluated police actions under "traditional standards of reasonableness."[14] Significantly, it did not impose the "general" law of anything, or a requirement of probable cause or a warrant. Instead, as petitioner urges, the Court evaluated the intrusion under traditional standards of reasonableness. *Moore*, 553 U.S. at 171. This analysis, not the Ninth Circuit's mechanical approach, is the proper method for evaluating whether S.G.'s interview complied with the Fourth Amendment.

---

[11] *Houghton*, 526 U.S. at 303.

[12] *Atwater*, 532 U.S. at 345 (quoting *McLaughlin*, 500 U.S. at 60 (Scalia, J., dissenting)).

[13] *Moore*, 553 U.S. at 171 (noting history's failure to provide "a conclusive answer" to the question).

[14] *Moore*, 553 U.S. at 171 ("[w]hen history has not provided a conclusive answer, we have analyzed a search or seizure in light of traditional standards of reasonableness"); *Atwater*, 532 U.S. at 346 ("when historical practice fails to speak conclusively to a claim grounded on the Fourth Amendment, courts are left to strike a current balance between individual and societal interests by subjecting particular contemporary circumstances to traditional standards of reasonableness"); *Houghton*, 526 U.S. at 299 300 ("[w]here [the historical] inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness").

C. *Illinois v. Lidster*

The Court may not need to consider the Court's modern approach in determining whether a balancing of traditional standards of reasonableness represents the correct means of evaluating this case. There exists an important Fourth Amendment distinction between the seizure of a suspect and the seizure of a potential witness. In *Illinois v. Lidster*, 540 U.S. 419 (2004), the Court evaluated suspicionless seizures of motorists at a police checkpoint. The checkpoint's "primary law enforcement purpose" was to "ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others." *Id.* at 423. The Court had previously decided a highway checkpoint case in *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000). The *Lidster* respondent argued that the *Edmond* Court had categorically rejected suspicionless stops of motorists undertaken for purposes of criminal law enforcement. The *Lidster* Court rejected that argument, observing:

> The checkpoint stop here differs significantly from that in *Edmond*. The stop's primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others. The police expected the information elicited to help

> them apprehend not the vehicle's occupants, but other individuals.

Id. at 423 (emphasis in original). Thus, a police officer seeking information about a crime that someone else has committed engages in a fundamentally different kind of law enforcement activity from a police officer seizing and interrogating a person suspected of a crime. The activity of the information-seeking officer is ill-suited to Fourth Amendment concepts like individualized suspicion and warrants. The Court recognized this distinction, evaluated the former seizure by balancing the public and private interests implicated by the activity, and concluded the seizure was reasonable. *Id.* at 428.

Lidster is not significant in that it governs how the government and private interests in this case should be balanced. Rather, it is significant because it validates petitioner's contention that, regardless whether the seizure here fits within the "special needs" line of cases discussed in section C below, this Court should not automatically impose (as did the Ninth Circuit) a warrant, court order, parental consent, or exigent circumstances requirement as indispensible conditions of constitutional reasonableness. As with the Court's "modern" and "special needs" approaches, *Lidster* requires the use of traditional standards of reasonableness to balance the public and private concerns implicated by a seizure. *Lidster*, 540 U.S. at 426.

Standing alone, *Lidster* requires the Court to reject any suggestion that the Fourth Amendment necessarily imposes a warrant or probable cause requirement on S.G.'s seizure. If the Fourth Amendment requires a warrant, court order, exigent circumstances, or parental consent, such a requirement can only be ascertained by engaging in a balancing of the relevant public and private interests implicated by this type of seizure.

D. "Special Needs"

Even if the Court's modern approach, or its approach in *Lidster* do not compel evaluation of S.G.'s seizure in light of traditional standards of reasonableness, the nature of the seizure here fits comfortably within the "special needs" line of cases. These cases, like those in the Court's other approaches, eschew blind application of a warrant or probable cause requirement. Instead, "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable,'" probable cause and a warrant are not required components of Fourth Amendment reasonableness. *Skinner*, 489 U.S. at 619.

In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) Justice Blackmun observed that when "special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirements impracticable," the Fourth Amendment requires reasonableness to be assessed through a balancing of

interests. 469 U.S. at 351 (Blackmun, J., concurring). Since this observation, the Court has invoked "special needs" in the context of warrantless searches of schoolchildren by school officials, warrantless home searches of probationers, suspicionless drug testing of high school athletes, and suspicionless drug testing of railroad and customs service employees. *Bd. of Ed. of Ind. Sch. Dist. No. 92 of Pottawatomie Co. v. Earls*, 536 U.S. 822, 827-30 (2002) and *Vernonia*, 515 U.S. at 664-65 (schoolchildren); *Skinner*, 489 U.S. at 619 (railroads); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 677 (1989) (customs service).

1. What Constitutes a "Special Need"?

Some controversy exists as to what constitutes a sufficiently "special" need to trigger a balancing inquiry. However, two cases in which the Court held that the asserted government need was not sufficiently "special" to invoke the doctrine provide guidance.

In *Chandler v. Miller*, 520 U.S. 305 (1997), the Court considered a Georgia statute which required all political candidates to submit to a urinalysis prior to running for office. *Id.* at 309. The State contended the requirement was reasonable based upon the premise of the "incompatibility of unlawful drug use with holding high state office." *Id.* at 318. It further asserted that the statute was justified "because the use of illegal drugs draws into question an official's judgment and integrity; jeopardizes the discharge of

public functions, including antidrug law enforcement efforts; and undermines public confidence and trust in elected officials. . . . The statute . . . serves to deter unlawful drug users from becoming candidates and thus stops them from attaining high state office." *Id.* This Court held the proffered need was insufficiently "special" and essentially amounted to nothing more than "set[ting] a good example" *Id.* at 322. Thus, to be "special" a need must involve concerns which are "real and not simply hypothetical," and must represent a "concrete danger." *Id.* at 319. Symbolism does not constitute a "special need." *Id.*

In *Ferguson v. City of Charlotte*, 532 U.S. 67 (2001), the Court considered a drug testing policy which targeted expectant mothers presumed to be at higher risk for drug abuse for suspicionless urine tests for the presence of cocaine. Women who tested positive were given a choice, attend substance abuse treatment or be arrested. The *Ferguson* Court rejected the state's attempt to justify these searches as advancing the "special governmental need" of health and safety of expectant mothers and infants because, according to the Court, the "immediate" means of accomplishing this purpose was the generation of evidence for criminal prosecution of the women who were tested. *Id.* at 83-84 ("the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce patients into substance abuse treatment"). *Ferguson* holds that government officials cannot use the special needs cases

as a loophole to implement suspicionless searches for law enforcement purposes. 532 U.S. at 85.

Read together, *Chandler* and *Ferguson* provide a rough analytical framework for a determination of whether a governmental need is sufficiently "special" to constitute a Fourth Amendment "special need." *Chandler* requires that a Fourth Amendment "special need" be something other than "set[ting] a good example." *Chandler*, 520 U.S. at 532. The hazards which the program is designed to ameliorate must be "real and not simply hypothetical" and must represent a "concrete danger." *Id.* *Ferguson* holds that government officials cannot use "special needs" as a loophole to implement suspicionless searches for law enforcement purposes. 532 U.S. at 85. If the rule in *Ferguson* applies to a challenged governmental action, then the "primary purpose" of the action as well as its "immediate objective" must be something other than generation of evidence for criminal law enforcement purposes. *Id.* at 83.

2. "Special Needs" Govern the Seizure at Issue Here

"It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is compelling." *New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). "A democratic society rests, for its continuance, upon the healthy, well-rounded

growth of young people into full maturity as citizens." *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944). "There is no more worthy object of the public's concern" than the welfare of children. *Wyman v. James*, 400 U.S. 309, 318 (1971).

There is nothing "hypothetical" or "symbolic" about the immensity of the problem posed by the abuse and victimization of children in American society today. In 2008, child welfare officials received approximately 3,300,000 reports of child abuse involving approximately 6,000,000 children.[15] After assessment or investigation, 690,061 different children were found to have been victims of abuse.[16] More than 69,000 of these children were abused sexually.[17] Of all abuse, 81.2% was perpetrated by one or both parents.[18] The hazards of abuse are real, and the danger concrete.

The seizure at issue in this case was undertaken pursuant to Oregon's child welfare statutes. These statutes reflect the measured response the State has ordained in investigating and responding to the needs

---

[15] U.S. Dept. of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau (2010). *Child Maltreatment 2008* at 6. Available at http://www.acf.hhs.gov/programs/cb/stats_research/index.htm#can.

[16] *Child Maltreatment 2008* at 2.

[17] *Child Maltreatment 2008* at 45, Table 3-10 (69,184 victims).

[18] *Child Maltreatment 2008* at 28, Figure 3-6.

of its abused and neglected children. All governmental activities relative to such children are guided by the State's expressions of policy in Or. Rev. Stat. § 419B.010 (2001):

> The Legislative Assembly finds that for the purpose of facilitating the use of protective social services to prevent further abuse, safeguard and enhance the welfare of abused children, and preserve family life when consistent with the protection of the child by stabilizing the family and improving parental capacity, it is necessary and in the public interest to require mandatory reports and investigations of abuse of children and to encourage voluntary reports.

There is no express intent to further criminal law enforcement interests in the policy statement or, for that matter, anywhere else in the statutory scheme. The statutes do not encourage "entanglement between law enforcement and social service workers," as the Ninth Circuit concluded below. (App. to Pet. for Cert. at 35) Under Oregon law, a child abuse investigation begins when a report is made to either police or the Department of Human Services ("DHS"). Once a report is received, DHS must notify local law enforcement and vice versa. Or. Rev. Stat. § 419B.015. After cross-notification occurs, either DHS or the law enforcement agency must immediately investigate the "nature and cause of the abuse." Or. Rev. Stat. § 419B.020(1)(a). If the investigation concludes there is "reasonable cause" to believe abuse has occurred, the only result mandated by the scheme is protective.

DHS must provide "protective social services" if necessary to protect the child from further abuse or to safeguard her welfare. Or. Rev. Stat. § 419B.020(2).

The "initial and continuing focus" of the statutory scheme here is the protection of the child, not anyone's arrest or prosecution. The duty to investigate and provide protective services exists regardless of whether a suspect can be identified or apprehended. The statutes and rules applicable to this seizure devote significant attention to the child's needs for protection and social services. An abused child can be taken into protective custody, placed in shelter care, or released to a parent or other responsible person. Or. Rev. Stat. § 419B.175. If a child's needs include shelter care, civil protective proceedings are mandatory, as are "protective social services." Or. Rev. Stat. § 419B.185(1) and 419B.020(2). Criminal law enforcement concerns are required by statute to take a back seat to the state's overarching interests in protection. Or. Rev. Stat. § 418.747(5) (in all child abuse investigations "[p]rotection of the child is of primary importance"). The authorities permitting information sharing do not treat sharing for law enforcement purposes preferentially. Information discovered in an investigation is provided on an equal basis for law enforcement and non-law enforcement purposes. *See* Or. Rev. Stat. § 419B.035(1) and (2) (setting forth circumstances in which DHS may release confidential child abuse investigatory information). Criminal prosecution is not an ingredient in the success or failure of Oregon's system of child

abuse investigation and response. Here investigation of abuse and protection of children occur *regardless* of the outcome or existence of a criminal case.

As can be seen from the bleak statistics concerning child abuse, *Chandler's* requirement of real and concrete danger is satisfied. It is also clear *Ferguson's* "ultimate" versus "immediate" purpose test (to the extent it is even required or applicable), is also satisfied. Oregon's statutory scheme demonstrates that the primary, ultimate, and immediate purpose of the seizures here is to determine if a child has been abused and is in need of protection. This purpose is distinct from a "general law enforcement" purpose. Law enforcement interests, while significant, are always subordinate to the child's need for protection. *See* Or. Rev. Stat. § 418.747(5).

Because "special needs" are present in this context, the question of whether the Fourth Amendment required S.G.'s seizure to be authorized by a warrant, court order, exigent circumstances or parental consent must be determined by "balancing [the seizure's] intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." *Vernonia,* 515 U.S. at 653. For the reasons discussed in sections III and IV below, the proper Fourth Amendment balance here is that a warrantless seizure of a child who is reasonably suspected of being a victim of abuse and in need of protection is reasonable so long as the seizure is no more intrusive than is reasonably necessary to

determine if the child has been abused and in need of protection.

E. An Identical "Traditional Reasonableness" Standard Applies to All Three Modes of Analysis

The same process and standards of determining Fourth Amendment reasonableness apply no matter which of the three modes of analysis ("modern" approach, "special needs," or *Lidster*) the Court selects. In any event, the reasonableness determination is made "by assessing, on the one hand, the degree to which [the challenged practice] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Moore*, 553 U.S. at 171; *Lidster*, 540 U.S. at 427 ("in judging reasonableness we look to 'the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty"); *Vernonia*, 515 U.S. at 653 (reasonableness in "special needs" context "is judged by balancing [the practice's] intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests"). Where a "responsible Fourth Amendment balance" weighs against the imposition of a warrant or probable cause requirement, the Court holds the Fourth Amendment imposes no such requirement. *See, e.g.*, *Earls*, 536 U.S. at 830 ("special needs" requires "a fact-specific balancing of the intrusion on the

children's Fourth Amendment rights against the promotion of legitimate governmental interests"); *Atwater*, 532 U.S. at 347 (applying "traditional standards of reasonableness" to determine arrests outside a private home for a "very minor criminal offense" do not require a warrant); *Von Raab*, 489 U.S. at 677 (finding a "special need" and, after balancing the public interest in the Service's testing program and the privacy interests, upholding a program of warrantless, suspicionless drug testing of some Customs Service employees against Fourth Amendment challenges); *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) ("balancing intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interest" justified 16-hour warrantless detention at the international border based on reasonable suspicion of drug smuggling).

Hence, no matter the approach, the Ninth Circuit's adamant refusal to balance the intrusion on S.G.'s privacy with the governmental interests involved was just plain wrong. Instead of blithely declaring the "general law of search warrants applies to child abuse investigations," it should have evaluated the intrusion based upon "traditional standards of reasonableness," balancing "on the one hand the degree to which [the seizure] intruded on . . . privacy and, on the other, the degree to which it was needed for the promotion of legitimate governmental interests." *See Moore*, 553 U.S. at 171.

Application of the proper reasonableness balance in this case includes no warrant or probable cause requirement. Here, properly analyzed, a government official (including a police officer) acts reasonably when he or she, without a warrant, seizes a schoolchild based upon a reasonable suspicion that the child has suffered abuse and needs protection. A constitutionally reasonable seizure should be no more intrusive than what is reasonably needed to determine if the child has been abused and requires protection.

II. "Traditional Standards of Reasonableness" Demonstrate that S.G.'s Interview Was Reasonable

Evaluating a seizure under "traditional standards of reasonableness" involves a weighing of (1) the gravity of the public concerns served by the seizure; (2) the degree to which the seizure advances the public interests; and (3) the severity of the interference with individual liberty. *Lidster*, 540 U.S. at 427 (citing *Brown v. Texas*, 443 U.S. 47, 51 (1979)). Use of this tripartite protocol demonstrates the reasonableness of the S.G. interview.

A. Seizures of this Type are Reasonable Because They Serve the Broad and Weighty Public Interest of Protecting Children from the Harmful Effects of Abuse

Child abuse, and in particular child sexual abuse, is a pervasive problem of national significance. As shown above, *infra.*, p. 29, the latest national statistics concerning child abuse establish it is a problem of "staggering"[19] proportions. The immediate effects of such abuse only begin to tell the story, as its destructive effects persist for years. Those victims who survive the abuse have a higher incident of psychiatric illness,[20] alcoholism,[21] drug addiction,[22] marital and family problems[23] and suicide attempts.[24] The threat posed by all forms of child abuse is at least as compelling as the threat presented by illicit childhood drug use considered in *Vernonia* and *Earls*. 536 U.S. at

---

[19] App. to Pet. for Cert. at 3.

[20] Jeffery B. Bryer, et al., *Childhood Sexual and Physical Abuse as Factors in Adult Psychiatric Illness*, 144 AM. J. PSYCHIATRY 1426, 1430 (1987); Elaine Carmen, et al., *Victims of Violence and Psychiatric Illness*, 141 AM. J. PSYCHIATRY 378 (1984).

[21] Shanta R. Dube, et al., *Long Term Consequences of Childhood Sexual Abuse by Gender of Victim*, 28 AM. J. PREV. MED. 430, 434 (2005).

[22] Frederick S. Cohen and Judianne Densen-Gerber, *A Study of the Relationship Between Child Abuse and Drug Addiction in 178 Patients: Preliminary Results*, 6 CHILD ABUSE AND NEGLECT 383-87 (1982).

[23] Dube, *supra*, FN 21 at 435.

[24] *Id.*

834-36; 515 U.S. at 660-64. Children deserve to be protected from abuse, and interviews such as S.G.'s advance the state's interest in protecting children from abuse.

To establish a grave public concern, it is unnecessary for the state to demonstrate its conduct was motivated by a public concern closely related to the specific facts of a particular search or seizure. Instead, where the state shows that its conduct was driven by a legitimate concern about a problem of broad, general significance, the Court will accept the justification and recognize the serious public concern. In *Vernonia*, the Court stated:

> It is a mistake . . . to think that the phrase "compelling state interest," in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation the question: Is there a compelling state interest here? Rather, the phrase describes an interest that appears *important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy.

515 U.S. at 661 (emphasis in original).

Consistent with this principle, the Court has found numerous widespread societal problems sufficiently grave to weigh in favor of searches or seizures conducted without a warrant, probable cause or in some cases individualized suspicion. *See, e.g., United*

States v. Knights, 534 U.S. 112, 121 (2001); *Griffin v. Wisconsin*, 483 U.S. 868, 873-75 (1987) (recidivism supports warrantless home searches of parolees and probationers); *Lidster*, 540 U.S. at 426-27 (concern regarding the need to locate witnesses to a crime supports suspicionless, warrantless traffic stop); *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 451 (1990) (dangers of drunk driving supports suspicionless, warrantless traffic stops); *New York v. Burger*, 482 U.S. 691, 708-09 (1987) (problem of automobile theft supports suspicionless, warrantless junkyard inspections); *Montoya de Hernandez*, 473 U.S. at 538-40 (interest in drug interdiction supports an extended, warrantless detention); *United States v. Martinez-Fuerte*, 428 U.S. 543, 561-64 (1976) (concerns of border security support warrantless stops).

Closer to S.G.'s case, the Court held the general concern of preventing "the substantial harm of childhood drug abuse provide[d] the necessary immediacy" to support warrantless, suspicionless drug tests in *Earls* and *Vernonia*. 536 U.S. at 834-36; 515 U.S. at 660-64. *Earls* and *Vernonia* show that a grave public concern exists where the state seeks to protect children from harm. In both cases, the Court believed that "drug abuse among the Nation's youth" constituted a sufficiently "pressing concern" to support warrantless, suspicionless drug testing at public schools. *Earls*, 536 U.S. at 834-35; *Vernonia*, 515 U.S. at 661-62. That children were threatened served to intensify the gravity of the government's interest. So in *Earls* the Court stated, "As in *Vernonia*, 'the

necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction.'" *Id.* at 834-35 (quoting *Vernonia,* 515 U.S. at 662).

For these reasons, the public concern served by interviews to protect children from abuse clearly support a temporary in-school detention of a suspected child abuse victim. This concern is consistent with this Court's holdings placing the protection of children at the pinnacle of those interests served by government. Thus, the Fourth Amendment balance weighs heavily in favor of standards which encourage this sort of activity.

B. Seizures of this Type are Reasonable Because They Substantially Advance the Public's Interest in Protecting Children from the Harmful Effects of Abuse

In analyzing the degree to which a seizure advances the public interest, the Court considers the efficacy of the seizure as a means for meeting the public interest. *See Lidster,* 540 U.S. at 427; *Sitz,* 496 U.S. at 453-55; *Burger,* 482 U.S. at 709-10. The efficacy analysis is "not meant to transfer from politically accountable officials to the courts the decision as to which law enforcement techniques should be employed to deal with a serious public danger." *Sitz,*

496 U.S. at 453. Rather, the "choice among reasonable alternatives remains with the government officials" who have a more complete understanding of the issues involved, and their choice of methods to address the problem at issue is owed substantial deference. *Id.*

1. The Public Interest in Child Protection is Advanced by a System of Coordinated Investigations and Early, Face-to-Face Interviews With Suspected Victims Conducted Away from Potential Undue Influence

The Oregon legislature has clearly determined interviews such as S.G.'s are an effective means of protecting children from abuse. Obviously, without first determining whether a child is being abused, the state cannot begin to protect her. A face-to-face discussion with a child about suspected abuse constitutes an effective, if not the most effective, means to determine whether abuse is occurring. Such interviews permit officials to speak directly with and observe suspected victims. In addition to speaking to her, an investigator can observe the child's physical appearance, demeanor, emotional state, and level of hygiene. He can see if she appears malnourished or in acute distress. He can assess if she may have a disability which should be considered in determining her need for protection. Such insight simply cannot be gained without speaking directly to a child.

Where, as here, a suspected abuser is a parent, or where the suspected abuser's identity is unknown, the public interest is served by meeting the child away from the potential abuser or the abusive environment. Parents are frequent perpetrators of abuse. Discussing possible abuse in front of one or both parents could affect a child's ability to respond honestly or may prove to be traumatic. Especially where the potential perpetrator is a parent, children will often be reluctant to disclose abuse, or may recant once they have disclosed, due to family pressure.[24] Several courts have recognized this dynamic.[25] Further, where a parent may be the abuser, seeking consent from either parent could be detrimental to the child. Either parent could intentionally or unintentionally influence the child before an interview can take place.

Finally, children's interests are served when officials have the flexibility of having either a social

---

[24] Lindsay Malloy, M.A., Thomas D. Lyon, J.D., and Jodi Quas, Ph.D., *Filial Dependency and Recantation of Child Sexual Abuse Allegations*, 46 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 162, 163, 166 (Feb. 2007); Dara Loren Steele, Note, *Expert Testimony: Seeking an Appropriate Admissibility Standard for Behavioral Science in Child Sex Abuse Prosecutions*, 48 DUKE L.J. 933, 938-39 (1999).

[25] *See, e.g., United States v. Butterfly*, 182 F.3d 928 (9th Cir. 1999); *United States v. George*, 960 F.2d 97, 101 (9th Cir. 1992); *United States v. Provost*, 969 F.2d 617, 621 (8th Cir. 1992). *See also State v. Storch*, 612 N.E.2d 305, 315 (Ohio 1993) ("Child abuse victims, susceptible to parental influence, are likely to change testimony . . . ").

service worker, a police officer, or both conduct these interviews. In Oregon, child welfare agencies and law enforcement are required to coordinate efforts during child abuse investigations.[27] Coordination facilitates efforts to conduct interviews jointly, thereby reducing the number of times a child may have to discuss an uncomfortable topic with strangers.

Repeated questioning of abused children has been described as a "second victimization," in which the suspected victim is subjected to multiple interviews requiring repeated descriptions of the abuse.[28] In a recent case, Dr. Catherine Dixon, the Clinical Director of the Mississippi Children's Advocacy Center in Jackson explained "by coordinating the multi-agency response to child abuse, and by designating a forensic interviewer, children are spared the additional stress and better information is obtained, inevitably leading to better decision-making. And better decision-making positively impacts child protection and prosecution outcomes." *Kazery v. State*, 995 So.2d 827 (Miss. App. 2008).

Some may disagree with the approach Oregon has taken. They could believe child welfare and police concerns about parental influence or coercion of victims are overblown, or that in conducting seizures of

---

[27] *See, e.g.*, Or. Rev. Stat. §§ 418.747, 418.783, and 418.784.

[28] John E.B. Myers, *The Legal Response to Child Abuse: In the Best Interest of the Children?*, 24 J. Fam. L. 149, 182-84 (1985).

this type officials discount the possibility of trauma caused by an interview conducted away from a loving parent. The Court need not enter this debate to resolve this case. The Court's analysis of the efficacy of a seizure is "not meant to transfer from politically accountable officials to the courts the decision as to which law enforcement techniques should be employed to deal with a serious public danger." *Sitz*, 496 U.S. at 453. It has also rejected any assertion that a search or seizure is illegal simply because there may exist a less intrusive method to advance the state's objectives. *Montoya de Hernandez*, 473 U.S. at 542. The means chosen by Oregon to advance its interest in protecting children are reasonable and clearly do advance significantly the public's interest in protecting children from abuse.

2. The Public's Interest in Child Protection Would be Impeded by a Warrant Requirement for Seizures of this Type

Applying a warrant requirement to seizures of this type would frustrate the government's purpose. The Court has recognized the government's interest in dispensing with a warrant is strongest when the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the intrusion. *Skinner*, 489 U.S. at 623 (citing *T.L.O.*, 469 U.S. at 340). Requiring a warrant in the present context would work against the public interest by interfering with the very purpose of these interviews.

The Court has consistently upheld warrantless searches and seizures where the delay in obtaining a warrant would frustrate the government's interest in prompt action. *See Skinner*, 489 U.S. at 623-24 (warrant unnecessary before testing for the presence of drugs and alcohol because alcohol and other drugs are eliminated from the blood stream at a constant rate, and testing needed to occur as quickly as possible to ensure detection); *Burger*, 482 U.S. at 710 (the delay inherent in obtaining a warrant would frustrate the government's attempts to deter automobile theft at junkyards because "stolen cars and parts often pass quickly through an automotive junkyard," and "flexibility as to time, scope, and frequency" of inspections were necessary to further the statute's purpose); *Griffin*, 483 U.S. at 876 (the delay inherent in obtaining a warrant would make it more difficult for probation officials to respond quickly to evidence of misconduct); *T.L.O.*, 469 U.S. at 340 (warrant requirement unsuited to school environment where school officials need to act swiftly to impose discipline).

The systemic burdens of a warrant requirement in this context are contrary to the public interest. Any apprehension that a child may have been abused or is in need of protection deserves prompt attention. A warrant requirement would introduce delays at the critical first moments of any case while officials do their best to determine how likely it is that a particular child will be hurt in the time it takes to find a judge to review a warrant application. The public

interest is not served by these systemic burdens or a requirement that introduces the need for an on-the-spot, highly fact specific determination of risk at a time when information is at its scarcest. Moreover, a child abuse assessment implicates not only concepts familiar to judges, but also specialized knowledge relating to a child's mental or psychological functioning, cultural heritage, and special needs. Or. Rev. Stat. § 419B.005(1)(a)(B) (abuse includes mental injury which is determined by reference to psychological functioning and child's culture).

This case provides an apt illustration of the systemic burdens of a warrant requirement in the context of child welfare interviews. Petitioners knew that Nimrod recently had been released from jail after being arrested on charges of sexually abusing a seven-year old boy. They had evidence that S.G. and her five-year old sister had been sexually abused by Nimrod and that their mother feared him. They knew that Nimrod would be having unsupervised contact with his suspected victims. Thus, petitioners were left with a stark choice, use the methods at their disposal to determine whether S.G. had been abused and to protect her from such abuse, or risk allowing the suspected abuse to continue while they developed information concerning abuse in some other fashion. Under a warrant regime, while petitioners engaged in the laborious process of obtaining evidence from sources other than S.G., they would have had to continually assess the situation confronting S.G. to determine if it was *dangerous enough* to justify

emergency action. A warrant requirement, with the attendant need to support the warrant with evidence demonstrating probable cause, would frustrate the efforts of state officials to act quickly to protect the safety of children where abuse is suspected and would interfere with the ability of DHS caseworkers and police officers to assess and meet a vulnerable child's social service needs.

3. The Public's Interest in Child Protection Would be Impeded by a Probable Cause Requirement for Seizures of this Type

The Court has consistently held that in contexts where individuals have reduced expectations of privacy, warrant and probable cause requirements have a lessened application. *Knights*, 534 U.S. at 118-22; *Burger*, 482 U.S. at 702 (citing *T.L.O.*, 469 U.S. at 353 (Blackmun, J., concurring)); *Griffin*, 483 U.S. at 873-76 (rejecting probable cause standard in favor of "reasonable grounds" standard for in-home searches of probationers); *O'Connor v. Ortega*, 480 U.S. 709, 721-25 (1987) (plurality) (reasonable suspicion standard adopted for work-related searches of employees' desks and offices). Nevertheless, where the "balance of interests precludes insistence on a showing of probable cause, [the Court has] usually required some quantum of individualized suspicion before concluding that a search is reasonable." *Skinner*, 489 U.S. at 624 (citing *Martinez-Fuerte*, 428 U.S. at 560). A showing of individualized suspicion, however, is

"not a constitutional floor[ ] below which a search must be presumed unreasonable." *Skinner*, 489 U.S. at 624. "[W]here the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the search would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion." *Id.*

The Court has been willing to reject a probable cause requirement where it would frustrate legitimate governmental needs for flexibility and swiftness in conducting a search or a seizure. For instance, the *Skinner* Court held that requiring *any* individualized suspicion in implementing drug and alcohol screening of railroad employees would "seriously impede" the government's goal of detecting and preventing drug and alcohol use by railroad employees. *Id.* at 628-31. The Court held that because of the hidden, fleeting nature of the evidence the drug testing regime was designed to detect (the presence of alcohol and narcotics in the blood or urine), suspicionless drug screening was necessary to further the government's purpose. *Id.* Similarly, in *T.L.O.*, the Court refused to require school administrators to obtain probable cause before searching students for suspected violations of school rules because to do so would unduly frustrate the government's need for flexibility and swiftness in imposing discipline and maintaining order in its schools. 469 U.S. at 337-41. Instead, the Court imposed a requirement of reasonable suspicion before such a search could occur, reasoning that such

a standard would strike an appropriate balance between student privacy and the government's need for flexibility and swiftness. *Id.* at 342-43; *see also, Griffin*, 483 U.S. at 876 ("the probation agency must be able to act based upon a lesser degree of certainty than the Fourth Amendment would otherwise require in order to intervene before a probationer does damage to himself or society.").

The above-cited cases amply demonstrate why a probable cause standard should not be imposed before interviews such as the interview of S.G. can take place. As demonstrated below, the privacy interests of students attending public school are clearly reduced, and therefore the intrusion into students' privacy resulting from such interviews is minimal. On the other hand, the government has a crucial need for flexibility and swiftness in responding to credible allegations of abuse. For instance, children with reduced verbal or cognitive abilities would suffer acutely from a probable cause standard. The children who are the least able to make the spontaneous detailed, consistent disclosures which would establish probable cause are the ones who would benefit most from an assessment conducted by a patient, trained professional. Imposing a requirement of probable cause would clearly frustrate the needs of the government, and the Court should reject Respondents' pleas to the contrary.

C. Seizures of this Type are Reasonable Because They Minimally Intrude on a Child's Privacy Interests

The degree to which an individual can expect to be free from government intrusion into her privacy varies depending upon where the intrusion takes place and/or what legal relationship the government has undertaken concerning the individual at the time of the intrusion. As explained in *Vernonia*:

> The Fourth Amendment does not protect all subjective expectations of privacy, but only those society recognizes as "legitimate." What expectations are legitimate varies, of course, with context, depending for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park. In addition, the legitimacy of certain privacy expectations vis-à-vis the State may depend upon the individual's legal relationship with the State. For example, in *Griffin v. Wisconsin*, we held that, although a "probationer's home, like anyone else's, is protected by the Fourth Amendment," the supervisory relationship between probationer and State justifies "a degree of impingement upon [a probationer's] privacy that would not be constitutional if applied to the public at large."

Id. at 654 (quoting *Griffin*, 483 U.S. at 873-75).

1. Children, and Even More So Children Who Attend Public School, Have a Lesser Expectation of Privacy Than Does the General Public

In contexts where the government has taken on a supervisory relationship with a particular group, individuals within that group often cannot expect the same level of individual liberty as can the public at large. *Knights*, 534 U.S. at 119; *Griffin*, 483 U.S. at 873-75 (parolees and probationers).

Children possess diminished expectations of both privacy and liberty simply by virtue of their minority: "Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination – including even the right of liberty in its narrow sense, i.e., the right to come and go at will." *Vernonia*, 515 U.S. at 654 (citing Am.Jur.2d, *Parent and Child* § 10 (1987)).

Children have an even lesser expectation of freedom while attending public school, where the government has taken on both custodial and tutelary functions with regard to schoolchildren. *Id.* at 654-56 ("Central, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster."); *Earls*, 536 U.S. at 829-32 ("As in *Vernonia*, the context of the public school environment serves as the backdrop for the analysis of the privacy interest at stake. . . . A student's privacy interest is limited in a public school

environment where the State is responsible for maintaining discipline, health and safety."); *T.L.O.*, 469 U.S. at 348-50 (Powell, J., concurring) (The school environment requires that students be subjected to greater controls than those appropriate for adults).

Indeed, the Court considered the reduced privacy expectations of children at public school to be "[t]he most significant element" in determining that the drug testing programs in *Vernonia* and *Earls* were constitutionally reasonable. *Vernonia*, 515 U.S. at 665; *Earls*, 536 U.S. at 831 ("In upholding the drug testing program in *Vernonia*, we considered the school context '[c]entral' and '[t]he most significant element.'") It has made clear that where the government has assumed the role of protecting the safety of children, as in the public school context, the privacy interests of children are necessarily reduced.

While the Court has not had occasion to consider the nature of a child's expectations of privacy at a public school in the context of child abuse interviews, the Fifth Circuit addressed this very issue in a similar situation in *Gates v. Texas Dept. of Protective and Regulatory Services*, 537 F.3d 404 (5th Cir. 2008). In *Gates*, the Fifth Circuit concluded a child's diminished expectations of privacy are the same relative to the seizure of a child at school during a child abuse investigation as they were in the context of the *Vernonia* drug testing program. *Id.* at 432.

Using traditional standards of reasonableness to evaluate the seizures involved, the court acknowledged the vast difference between a seizure of a child from her home and a seizure at a public school, where a child's liberty and privacy interests are reduced:

> Temporarily seizing a child from a public school in order to interview him in a safe place is decidedly different than seizing a child from his home for the purpose of removing him from allegedly abusive parents. . . . To begin with, the rights of children to freely move about, especially within a public school, are not as extensive as adults' rights. The Supreme Court has recognized that Fourth Amendment rights of children "are different in public schools than elsewhere; the 'reasonableness inquiry cannot disregard the schools' custodial and tutelary responsibilities for children.'" Thus, while the Fourth Amendment is not non-existent, students have a lesser expectation of privacy. Further, unemancipated minors lack the right to come and go at will, remaining subject to the control of their guardians or parents. Consequently, seizing a child from a public school is a lesser intrusion into the freedoms the child would otherwise enjoy, as those freedoms have already been limited.

Id. (citing *Vernonia*, 515 U.S. at 654-57). Based on this assessment, the Fifth Circuit found such interviews resulted in only a minimal invasion into the privacy rights of children who were seized, removed

from their school, and brought to a completely unfamiliar location to be interviewed. *Id.*

Given this Court's holdings in *Vernonia*, *Earls*, and *T.L.O.*, and considering the Fifth Circuit holding in *Gates*, the S.G. interview resulted only in a minimal intrusion into her privacy interests. S.G. was nine years old at the time of the interview. For that reason alone, regardless of her location or her relationship with the state, she simply did not enjoy the same expectations of privacy generally enjoyed by adults. Further, the interview occurred at a time and place where her expectation of privacy was diminished even more, at her public school during school hours.

2. The Means by Which Seizures of this Type are Accomplished are Not Seriously Invasive

The means petitioners used to interview S.G. were minimally invasive. They tailored her interview according to the procedures established in Oregon law. They first obtained consent from school officials to speak with her. They arranged for a school counselor to escort her to a school conference room for the interview, rather than removing her from class directly. The interview was also conducted in private, apart from faculty and other students, thereby avoiding any potential embarrassment or the disclosure of any sensitive information to persons not involved in the investigation.

In *Gates*, the Fifth Circuit recognized that interviewing children "in a safe place" reduces the intrusiveness of the interview. 532 F.3d at 432. Thus, it held it minimally intrusive for state officials to remove children from their school to an unfamiliar location to conduct child abuse interviews. *Id.* Unlike the *Gates* interviews, S.G.'s interview took place at her school, a familiar environment. The interview conference room was adjacent to the school's administrative offices, where school employees were present. Thus, compared with the children in *Gates*, who were shuttled by complete strangers to a completely alien environment, S.G. endured much less intrusion.

Even more striking, unlike the invasive searches involved in *Earls*, *Vernonia*, and *T.L.O.*, S.G. was not forced to disrobe, urinate into a cup, or be subjected to an invasive search of her person or effects. Rather, she was detained at her public school, where her already limited expectations of privacy were further reduced. Seizures such as this one, which involve subjects with a diminished expectation of privacy, are simply less intrusive than "searches of the body or the home." *Ferguson*, 532 U.S. at 83 n. 21. Clearly, S.G.'s seizure was much less invasive than the searches this Court found reasonable in *Earls*, *Vernonia*, and *T.L.O.*

Similarly, the Court's holdings in *Skinner*, *Griffin*, and *Knights* highlight the minimally intrusive nature of this activity. The *Skinner* Court rejected a probable cause requirement for drug and alcohol testing, and instead authorized suspicionless testing

involving drawing blood and urine from subjects. In *Griffin* and *Knights*, the Court rejected a probable cause requirement in favor of reasonable suspicion despite the fact that the searches were of the individual's home. A citizen's Fourth Amendment interests are at their highest at the threshold of their home and inside of their bodies. *Ferguson*, 532 U.S. at 84 n. 21; *Skinner*, 489 U.S. at 623; *Payton v. New York*, 445 U.S. 573, 585 (1980) (unreasonable intrusion into home "chief evil" Fourth Amendment designed to prevent). Yet, the Court in *Skinner*, *Griffin*, and *Knights* condoned intrusions into these sensitive areas. The activity here, conducted at a public school, is even less invasive than the searches upheld in *Skinner*, *Griffin*, and *Knights*.

Moreover, the Court has never held that the act of posing questions to individuals, by itself, intensifies the intrusiveness of a seizure. In fact, prior decisions seem to indicate that mere questioning by government officials, without more, does nothing to enhance a seizure's intrusiveness. *See, e.g.*, *Lidster*, 540 U.S. at 425; *United States v. Drayton*, 536 U.S. 194, 204 (2002) (after boarding a bus and asking questions of passengers, nothing said by a police officer during questioning would have suggested to a reasonable person that they were barred from leaving the bus); *I.N.S. v. Delgado*, 466 U.S. 210, 216-17 (1984) (mere questioning, by itself, does not result in a seizure). Nothing in this record demonstrates that petitioner or Camreta used coercive or intimidating tactics in asking S.G. questions. They certainly did

not subject her to a harsh or threatening interrogation, and she certainly was not asked questions designed to elicit incriminating evidence against her. Instead, Camreta simply asked questions while Alford "just sat there."

Finally, given the circumstances leading up to and including S.G.'s interview, its duration was reasonable. Despite the Ninth Circuit's reservations concerning the interview's length, the court acknowledged cases from other circuits holding that student detentions of a similar length or longer were reasonable. (App. to Cert. Pet. at 42-43)[9]

More importantly, the Ninth Circuit failed to consider that in analyzing reasonableness of seizures under the Fourth Amendment this Court has "consistently rejected hard and fast limits" to the duration of any given seizure. *Montoya de Hernandez*, 473 U.S. at 542-43 (citing *United States v. Sharpe*, 470 U.S. 675, 686 (1985)). Instead, the Court has held that "common sense and ordinary human experience must govern over rigid criteria," and "[a]uthorities must be allowed 'to graduate their response to the demands of

---

[9] *E.g.*, *Couture v. Bd. of Educ. of Albuquerque Pub. Schs.*, 535 F.3d 1243, 1254 (10th Cir. 2008) (detention for "one hour and thirty-five minutes" was reasonable); *Shuman v. Penn Manor Sch. Dist.*, 422 F.3d 141, 149 (3rd Cir. 2005) (detention lasting "no more than four hours" was reasonable); *Wofford v. Evans*, 390 F.3d 318, 321 (4th Cir. 2004) (one and one half hours detention was reasonable).

any particular situation.'" *Montoya de Hernandez*, 473 U.S. at 542-43 (citing *Sharpe*, 470 U.S. at 685).

In *Montoya de Hernandez*, the Court held the 16-hour warrantless detention of a suspected drug smuggler was reasonable in circumstances far more intrusive than the present. 473 U.S. at 542-43. The Court noted that the inspectors who detained the suspect had reasonable suspicion to believe she was attempting to smuggle narcotics across the border in her alimentary canal. *Id.* While the Court acknowledged the duration of the detention exceeded the duration of other detentions it had previously approved under the reasonable suspicion rubric, the Court concluded that under the particular circumstances, the extended detention of the suspect was reasonable. *Id.*

Looking at the circumstances of the seizure, the Court acknowledged "alimentary canal smuggling cannot be detected in the amount of time in which other illegal activity may be investigated through brief *Terry*-type stops." *Id.* This is because such smuggling "presents few, if any external signs," and a quick frisk will not detect the presence of narcotics. *Id.* Because the suspect refused consent to an x-ray, the Court concluded the inspectors had only two alternatives: "detain her for such time as necessary to confirm their suspicions, a detention which would last much longer than the typical *Terry* stop, or turn her loose . . . carrying the reasonably suspected contraband drugs." *Id.*

Taking its cue from "another *Terry*-stop case," the Court reasoned "[t]he Fourth Amendment does not require a policeman who lacks the precise level of information for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Id.* at 544 (citing *Adams v. Williams*, 407 U.S. 143 at 145 (1972)). Thus, the Court held, given the circumstances, it was reasonable for customs officers to detain the suspect "for the period of time necessary to either verify or dispel the[ir] suspicion." *Id.*

Montoya de Hernandez informs the Court's review of S.G.'s interview. No reasonable person would expect that the information needed to determine if 9-year old S.G. had been abused or needed protection could be obtained during a brief stop as in *Terry*. It ignores reality and common sense to suggest such an interview could be conducted by asking a few direct questions without first "breaking the ice" and trying to gain some level of trust or rapport with a young child. Camreta commenced the interview with S.G. by engaging in age-appropriate small talk about such familiar, non-threatening topics as school, homework, where she had lived, her pet cats, and her family. (Camreta Aff., pp. 2-4 and Ex. 3) Looking to the context of the interview, it is entirely reasonable that such a conversation would be time-consuming. Petitioners were complete strangers to S.G., and Camreta would be posing difficult questions of S.G. in what was likely a confusing and uncomfortable situation. S.G.'s own account of the conversation reveals the

Petitioners acted reasonably. According to S.G., after Camreta asked her some friendly questions the two began to speak about her father. (S.G. Aff., p. 2 ¶ 7) S.G. told Camreta that her father touched her "all over." (S.G. Aff., p. 2 ¶ 9) ("I told the man, yes, my dad touches me all over"). Camreta asked about these touches and S.G. told him these were not "bad touches." *Id.* Camreta approached the same topic, in several different ways for about an hour, but all S.G. would say was "I don't think my dad touched me in a bad way." *Id.*

Reason does not require abrupt termination of an abuse assessment if a frightened 9 year old girl says she does not "think" there is anything "bad" about being touched "all over" by her father, even if she says it several times over the course of an hour. Victims are sometimes reluctant to divulge that they have been abused, or may recant once they have divulged the abuse, especially where the perpetrator is a parent.[20] Camreta acted reasonably in continuing to ask questions, in several different ways, about S.G.'s father touching her "all over." It was reasonable to attempt to determine why (or even if) this frightened girl "thought" being touched "all over" by her father was not "bad." Subsequent questioning did nothing to dispel Camreta's reasonable suspicion of abuse. S.G.'s interview illustrates precisely why the Court has rejected a "bright line rule" to limit the duration of

[20] *See, supra,* FN 21 and 25.

seizures and why it should continue to do so here. Where pertinent information develops during the course of questioning, government officials act reasonably by continuing questioning to further develop such information. As the Court stated in *Montoya de Hernandez*, "[a]uthorities must be allowed 'to graduate their response to the demands of any particular situation.'" *Id.* at 542. While the record is unclear as to the exact moment S.G. began to describe her father's actions as abusive, it is clear this did occur. Petitioners were not required simply to terminate their questioning over some arbitrary concern about the length of the interview. *Id.* at 544. Rather, the Fourth Amendment authorized them to continue the interview "to either verify or dispel" their suspicion that S.G. had been abused. *Id.*

Finally, before the interview commenced, petitioners had significant evidence indicating S.G. not only had been abused but also faced the possibility of further abuse when she returned home; and they also knew that her younger sister was at risk. At some point during the interview, S.G. began to acknowledge her father's abuse. When that occurred, petitioners faced a choice similar to that faced by the customs agents in *Montoya de Hernandez*: Extend their questioning to obtain sufficient evidence to confirm or dispel their suspicions, or return S.G. to her home, where they reasonably suspected she and her little sister would be at risk for continued abuse. Petitioners were not required by the Fourth Amendment to choose the latter option.

III. The Court Should Adopt a Standard Similar to *T.L.O.*, Which Would Permit Child Protection Caseworkers and Law Enforcement Officers With Reasonable Suspicion of Abuse to Seize a Child for an Interview. Such a Standard Would Ensure Such Seizures are Reasonable in Scope and Protect the Interests of the Child

The *T.L.O.* Court fashioned a standard of student searches based on the approach of *Terry v. Ohio*, yet tailored to the public school context. 469 U.S. at 341-43. In announcing the standard, the Court stated:

> [T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the action was justified at its inception;" second, one must determine whether the search actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place." Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are *reasonable grounds* for suspecting that the search will turn up evidence that the student has violated or is violating the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light

> of the age and sex of the student and the nature of the infraction.

Id. (quoting *Terry*, 392 U.S. at 20) (emphasis added).

The Court concluded this standard would "neither unduly burden the efforts of school authorities to maintain order in their school nor authorize unrestrained intrusions upon the privacy of schoolchildren." *Id.*

Here, a similar balance of factors exists, but weighs even more heavily in favor of adopting a standard of reasonable suspicion. Children attending a public school simply do not enjoy the same privacy rights as those generally enjoyed by adults, whereas the government has an exceedingly compelling interest in protecting children from the devastating effects of abuse. The public's interest in protection is advanced by speaking to a suspected abuse victim and personally assessing her condition to at least the same degree the public's interest is advanced by finding and confiscating a pack of cigarettes from a middle school student. Surely, if the government's interest in acting swiftly to enforce a school's disciplinary rules against smoking justified the warrantless search in *T.L.O.*, its interests in protecting children from child abuse in all its forms justifies the adoption of a similar standard for interviews to investigate reasonably credible allegations of abuse and a child's need for protection.

The Court's adoption of a similar standard in this case would respect children's personal liberties while ensuring child welfare and law enforcement officials have the necessary flexibility to act swiftly in cases where credible evidence suggests a child is being abused. The interviews authorized by Oregon law provide a measured, narrowly tailored approach to investigate allegations of abuse and to determine if a child needs protection. The scope of such interviews is limited by Or. Rev. Stat. Ch. 419B and the statutory primacy given to the child's interests. *See*, Or. Rev. Stat. § 418.747(5). The very fact that such interviews often occur at a child's school gives a child's privacy interests further protection. Additionally, the *T.L.O.* standard gives caseworkers and law enforcement the flexibility they need to respond to allegations of abuse. Unquestionably, the government's need to act swiftly to respond to credible allegations of abuse such as those existing in this case is compelling. This is especially true when the potential abuser is one or both of the parents, a family member, a guardian, or anyone else close to a child. In this context, the immediacy of the need to verify the allegations of abuse is significantly heightened. After all, where else is a child to go when the school bell rings? The insidious nature of such abuse makes clear that requiring probable cause and/or a warrant before a child can be interviewed in the manner S.G. was would unduly

interfere with the government's exceedingly important duty to protect children from abuse.

The reasonableness standard ought to apply without regard to whether an interview is conducted by a social service worker or a police officer, or both. A unitary standard advances the state's interest in protection by allowing early decisions regarding the level of police or social worker involvement to be based upon the child's immediate needs, not upon whether a criminal prosecution may occur later. A separate standard applicable in cases where police are "involved" or, as here, merely present, imposes a systemic disincentive to police involvement even when police could provide a calming influence to a volatile situation or respond to a location faster than social services. For these reasons, the Court should reject the Ninth Circuit's unfounded holding that a warrant, court order, exigent circumstances, or parental consent must be obtained before temporarily seizing at a public school a child who is reasonably suspected to be a victim of child abuse. Instead, the Court should adopt a reasonableness standard similar to the standard formulated in *New Jersey v. T.L.O.*

CONCLUSION

Petitioner respectfully requests this Court to reverse the judgment of the Ninth Circuit and remand this case to the District Court with instructions

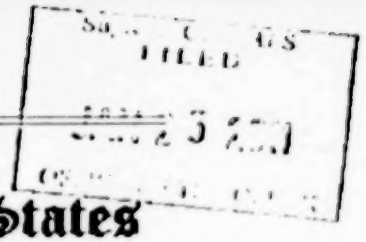
to enter summary judgment in favor of Alford on the basis that S.G.'s Fourth Amendment rights were not violated.

Respectfully submitted,

CHRISTOPHER DENNIS BELL
Counsel of Record
Assistant Legal Counsel
STEVEN EDWARD GRIFFIN
Assistant Legal Counsel
OFFICE OF DESCHUTES COUNTY LEGAL COUNSEL
1300 NW Wall Street, Suite 205
Bend, OR 97701
541-388-6624
christopher_bell@co.deschutes.or.us
steven_griffin@co.deschutes.or.us

Attorneys for Petitioner
Deschutes County Deputy Sheriff James Alford

Nos. 09-1454 and 09-1478



In The
Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor and K.G., a minor,

Respondents.

JAMES ALFORD, Deschutes County Deputy Sheriff,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor and K.G., a minor,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENTS

MIKEL R. MILLER
LAW OFFICE OF
MIKEL R. MILLER, PC
26 NW Hawthorne Avenue
Bend, OR 97701
(541) 388-9819
mike@bendlaw.net

ROBERT E. LEHRER
LAW OFFICES,
ROBERT E. LEHRER
36 South Wabash Street,
Suite 1310
Chicago, IL 60603
(312) 332-2121
rlehrer@rlehrerlaw.com

CAROLYN A. KUBITSCHEK*
DAVID J. LANSNER
LANSNER KUBITSCHEK
SCHAFFER
325 Broadway, Suite 201
New York, NY 10007
(212) 349-0900
ckubitschek@Lanskub.com

CAROLYN SHAPIRO
565 West Adams Street
Chicago, IL 60661
(312) 906-5392
Cshapiro1@kentlaw.edu

Counsel for Respondents

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

354
17

QUESTIONS PRESENTED

1. When official defendants prevail in the court of appeals by virtue of qualified immunity and plaintiff does not seek review of that judgment, meaning that she can no longer win any relief against defendants, but defendants seek review of statements in the court of appeals' opinion addressing whether defendants' conduct was constitutional, are those statements unreviewable in this Court?

2. Whether a police officer and a child protective services investigator violated the Fourth Amendment when they conducted a two-hour-long custodial interrogation of a nine-year-old girl at her school building, to determine if she was the victim of paternal child abuse, without a warrant or court order, without exigent circumstances, and without the consent of her mother.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Authorities	vi
Jurisdiction	1
Statement of the Case	1
Petitioners' Seizure of S.G.	1
Interview Protocols and the Seizure of S.G.	5
Events Leading Up to the Seizure of S.G.	8
The Aftermath of Petitioners' Seizure of S.G.	9
Proceedings Below	13
Summary of Argument	17
Argument	24
I. THE COURT OF APPEALS' RULING THAT PETITIONERS' SEIZURE OF S.G. VIOLATED HER FOURTH AMENDMENT RIGHTS IS NOT REVIEWABLE AND SHOULD BE LEFT INTACT	24
A. The Court of Appeals' Fourth Amendment Ruling Is Not Reviewable Because It Was Not Part of That Court's Judgment and Because Petitioners Prevailed by Virtue of That Judgment	24

TABLE OF CONTENTS – Continued

Page

B. The Court of Appeals' Fourth Amendment Ruling Is Not Reviewable Because the Appeals Present No Article III Case or Controversy 27

1. The Dispute Petitioners Bring to This Court Is Moot 27

2. The Court of Appeals' Fourth Amendment Ruling Is Not Reviewable Because Petitioners Lack Standing 31

C. Denying Review of the Fourth Amendment Ruling Is Consistent with *Pearson v. Callahan* 39

D. The Fourth Amendment Ruling Should Be Left Intact 41

II. PETITIONERS VIOLATED S.G.'S FOURTH AMENDMENT RIGHTS 43

A. Petitioners Seized S.G. Under the Fourth Amendment 45

B. The History of the Fourth Amendment Establishes That Petitioners' Seizure of S.G. Was Unreasonable 46

C. The Traditional Fourth Amendment Requirements of a Warrant and Probable Cause Apply to Petitioners' Seizure of S.G. 49

1. The Warrant Requirement Applies Here 50

TABLE OF CONTENTS – Continued

Page

2. Probable Cause Is the Appropriate Standard for Evaluating the Seizure of S.G. 56

3. *Illinois v. Lidster* Does Not Apply to the Seizure of S.G. 62

4. Family Privacy Concerns of Constitutional Significance Counsel in Favor of the Warrant and Probable Cause Requirements 66

D. The "Special Needs" Doctrine Does Not Apply Here 70

1. The Substantial Law Enforcement Involvement in the Seizure of S.G. Renders the "Special Needs" Doctrine Inapplicable 71

2. The Lack of Implicit Consent to the Seizure of S.G. Rendered the "Special Needs" Doctrine Inapplicable 74

3. The Rationales for the "Special Needs" Doctrine in the School Context Are Inapplicable Here 76

E. Even If a Lower Standard Applied Here, the Seizure of S.G. Was Unreasonable and Unconstitutional 79

1. There Are Multiple Public Concerns at Issue 80

2. The Interference with Individual Liberty Was Severe 83

TABLE OF CONTENTS – Continued

Page

3. The Seizure of S.G. Disserved the Public Interest 88

F. This Court Cannot Evaluate the Seizure by Reference to Its Inception Only 94

CONCLUSION 102

TABLE OF AUTHORITIES

Page

CASES

Alvarez v. Smith, 130 S. Ct. 576 (2009) 28, 29, 30

Atwater v. City of Lago Vista, 532 U.S. 318 (2001) 14, 53

Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986) 31, 32, 33

Black v. Cutter Laboratories, 351 U.S. 292 (1956) 24

Board of Education of Independent School District No. 92 of Pottawattamie County v. Earls, 536 U.S. 822 (2002) 74, 75, 77

Brendlin v. California, 551 U.S. 249 (2007) 46

Brown v. Illinois, 422 U.S. 590 (1975) 57

Brown v. Texas, 443 U.S. 47 (1979) 58, 67

Bunting v. Mellen, 541 U.S. 1019 (2004) 39, 40, 41

California v. Rooney, 483 U.S. 307 (1987) 17, 24, 25, 33, 43

Chambers v. Maroney, 399 U.S. 42 (1970) 65

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 37

Coffman v. Breeze Corp., 323 U.S. 316 (1945) 35

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 25

D.R. v. Middle Bucks Area Vocational Technical School, 972 F.2d 1364 (3d Cir. 1992) 87

Davis v. Mississippi, 394 U.S. 721 (1969) 57

TABLE OF AUTHORITIES – Continued

Page

Deposit Guarantee Nat. Bank v. Roper, 445 U.S. 326 (1980) 18, 25, 26, 27, 36

Doe v. Claiborne County, 103 F.3d 495 (6th Cir. 1996) 87

Doe v. Heck, 327 F.3d 492 (7th Cir. 2003) 46, 78

Doe v. Hillsboro Independent School District, 113 F.3d 1412 (5th Cir. 1997) 87

Dorothy J. v. Little Rock School District, 7 F.3d 729 (8th Cir. 1993) 87

Dunaway v. New York, 442 U.S. 200 (1979) 57, 60, 88

Electrical Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241 (1939) ..... *passim*

Ferguson v. City of Charleston, 532 U.S. 67 (2001) ..... *passim*

Florida v. Royer, 460 U.S. 491 (1983) 57, 88

Franz v. Lytle, 997 F.2d 784 (10th Cir. 1993) 82

Friedman v. Rehal, 618 F.3d 142 (2d Cir. 2010) ... 51, 93

Great Northern Life Ins. Co. v. Read, 322 U.S. 47 (1944) 32

Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204 (2002) 30

Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009) ..... *passim*

Greene v. Camreta, 2006 WL 758547 (D. Or. 2006) 2, 13, 32

Griffin v. Wisconsin, 483 U.S. 868 (1987) 16, 75

TABLE OF AUTHORITIES – Continued

Page

Hayes v. Florida, 470 U.S. 811 (1985) 57

Hewitt v. Helms, 482 U.S. 755 (1987) 18, 36, 37

Idaho v. Wright, 497 U.S. 805 (1990) 94

Illinois v. Lidster, 540 U.S. 419 (2004) ..... *passim*

Ingraham v. Wright, 430 U.S. 651 (1977) ... 48, 75, 76, 78

Jefferson v. City of Tarrant, Ala., 522 U.S. 75 (1997) 42

Johnson v. United States, 333 U.S. 10 (1948) 50

Jones v. Hunt, 410 F.3d 1221 (10th Cir. 2005) 78

Karcher v. May, 484 U.S. 72 (1987) 19, 33, 39, 41

Kaupp v. Texas, 538 U.S. 626 (2003) 57

Lewis v. Continental Bank Corp., 494 U.S. 472 (1990) 27, 31, 34

Manzanares v. Higdon, 575 F.3d 1135 (10th Cir. 2009) 55

Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) 20, 52, 65, 69

Maryland v. Pringle, 540 U.S. 366 (2003) 56

Michigan v. Summers, 452 U.S. 692 (1981) 58

Mincey v. Arizona, 437 U.S. 385 (1978) 42, 53

Miranda v. Arizona, 384 U.S. 436 (1966) 67

Mitchell v. Forsyth, 472 U.S. 511 (1985) 26

Montana v. Imlay, 506 U.S. 5 (1992) 42

TABLE OF AUTHORITIES – Continued

Page

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) 74, 75

New Jersey v. T.L.O., 469 U.S. 325 (1985) ..... *passim*

Nicholson v. Williams, 203 F.Supp.2d 153 (E.D.N.Y. 2002) 49

Nike, Inc. v. Kasky, 539 U.S. 654 (2003) 42

North Carolina v. Rice, 404 U.S. 244 (1971) 28

Owen v. City of Independence, Mo., 445 U.S. 622 (1980) 33

Pacific Bell Tel. Co. v. Linkline Communications, Inc., 129 S. Ct. 1109 (2009) 29

Parham v. J.R., 442 U.S. 584 (1979) 66, 67, 68

Pearson v. Callahan, 555 U.S. 223, 129 S. Ct. 808 (2009) ..... *passim*

Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984) 32

People v. Assad, 189 Cal. App. 4th 187 (3d Dist. 2010) 54

Perkins v. Click, 148 F.Supp.2d 1177 (D.N.M. 2001) 56

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 66

Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc. 506 U.S. 139 (1993) 25

Reed Elsevier, Inc. v. Muchnick, 130 S. Ct. 1237 (2010) 30

TABLE OF AUTHORITIES – Continued

Page

Safford Unified School Dist. No. 1 v. Redding, 129 S. Ct. 2633 (2009) 15, 76, 86

Samson v. California, 547 U.S. 843 (2006) 75

Santosky v. Kramer, 455 U.S. 745 (1982) 85

Saucier v. Katz, 533 U.S. 194 (2001) 13, 14, 39, 40

Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989) 73, 75

Smith v. Phillips, 455 U.S. 209 (1982) 89

Soldal v. Cook County, Illinois, 506 U.S. 56 (1992) 55, 58

Stanley v. Illinois, 405 U.S. 645 (1972) 83

State v. Michaels, 136 N.J. 299 (1994) 93

Steel Co. v. Citizens For a Better Environment, 523 U.S. 83 (1998) 40

Stone v. Holzberger, 807 F.Supp. 1325 (S.D. Ohio 1992) 56

Tenenbaum v. Williams, 193 F.3d 581 (2d Cir. 1999) 53, 60, 82

Terry v. Ohio, 392 U.S. 1 (1968) ..... *passim*

The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180 (1959) 43

Treat Title Ins. Co. v. Brown, 511 U.S. 117 (1994) 42

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 76

TABLE OF AUTHORITIES -- Continued

Page

Troxel v. Granville, 530 U.S. 57 (2000) 66

United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 59

United States v. Hensley, 469 U.S. 221 (1985) 59

United States v. Knights, 534 U.S. 112 (2001) 75

United States v. Montoya de Hernandez, 473 U.S. 531 (1985) 59

United States v. Place, 462 U.S. 696 (1983) 49, 64

United States v. Sharpe, 470 U.S. 675 (1985) 58

Valmonte v. Bane, 18 F.3d 992 (2d Cir. 1994) 81, 82

Vernonia School District 47J v. Acton, 515 U.S. 646 (1995) 74, 75, 86

Virginia v. Moore, 553 U.S. 164 (2008) 14, 46

Vitek v. Jones, 445 U.S. 480 (1980) 86

Walker v. City of Orem, 451 F.3d 1139 (10th Cir. 2006) 55

Wilson v. Arkansas, 514 U.S. 927 (1995) 46

Wyke v. Polk County School Board, 129 F.3d 560 (11th Cir. 1997) 86

Wyman v. James, 400 U.S. 309 (1971) 75

Wyoming v. Houghton, 526 U.S. 295 (1999) 14

Youngberg v. Romeo, 457 U.S. 307 (1982) 55

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 38

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION, STATUTES AND REGULATIONS

U.S. CONST. AMEND. IV ..... *passim*

U.S. CONST. AMEND. XI 32

U.S. CONST. AMEND. XIV 13, 76, 85

Act of September 24, 1789, ch. 20, §§30, 33, 1 Stat. 23, 88-91 47

Fed. R. Civ. P. 65(d) 37

42 U.S.C. §1983 ..... 13, 33, 41

42 U.S.C. §5106a(a)(6)(A) 69

42 U.S.C. §5106a(b)(2)(A)(xviii) 70

42 U.S.C. §13001(4) 82

42 U.S.C. §13002(a) 10, 89

45 C.F.R. §1340.14(d) 52, 61

Or. Rev. Stat. §418.747 90

Or. Rev. Stat. §419B.005(1)(a)(G) 52

Or. Rev. Stat. §419B.010(1) 9

Or. Rev. Stat. §419B.020(1)(a) 52

Or. Rev. Stat. §419B.030(1) 81

OTHER

1 W. Blackstone Commentaries 438 (1765) 48

1 W. Blackstone Commentaries 447 (1765) 68

3 W. Blackstone Commentaries 369 (1765) 47

TABLE OF AUTHORITIES – Continued

Page

5 W. LaFave, *Search and Seizure* §10.3(a) (4th ed. 2004) 71

ALI Model Code of Pre-arraignment Procedure, Commentary 290-91 (1975) 84

Annon, "Recommended Guidelines for Interviewing Children in Cases of Alleged Sexual Abuse," 6 IPT Journal (1994), http://www.ipt-forensics.com/journal/volume6/j6_3_2.htm 5, 91

C. Wright, A. Miller, E. Cooper, 13B Federal Practice and Procedure §3533 28

Coleman, "Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment," 47 Wm. & Mary L. Rev. 413 (2005) 69

Cubberly, *Public Education in the United States* 61-62 (1919) 48

Finkelhor, "Updated Trends in Child Maltreatment 2009," Table 3-13, at 46-47, http://www.unh.edu/ccrc/pdf/Updated_Trends_in_Child_Maltreatment_2009.pdf 81

http://www.acf.hhs.gov/programs/cb/pubs/cm08/table6_8.htm 81

Lamb, "Structured forensic interview protocols improve the quality and informativeness of investigative interviews with children: A review of research using the NICHD Investigative Interview Protocol" (2007) http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2180422/ 5, 93

TABLE OF AUTHORITIES – Continued

Page

Oregon Interviewing Guidelines (2d ed. 2004), http://www.doj.state.or.us/crimev/pdf/orinterviewingguide.pdf ..... *passim*

Ramsey, "In the Sweat Box: A Historical Perspective on the Detention of Material Witnesses," 6 OHIO STATE J. CRIM. L. 680 (2009) 47

Studnicki, "Material Witness Detention: Justice Served or Denied?" 40 WAYNE L. REV. 1533 (1994) 47

"The Role of Law Enforcement in the Response to Child Abuse and Neglect" (1992) http://www.childwelfare.gov/pubs/usermanuals/law/index.cfm 5, 6, 91

Wakefield, "Guidelines on Investigatory Interviewing of Children: What is the Consensus in the Scientific Community?", 24 AM. J. FORENSIC PSYCHOLOGY 57 (2007), http://www.ipt-forensics.com/library/ajfp1.htm 5, 93

JURISDICTION

Respondents object to petitioners' statements of jurisdiction. This Court does not have jurisdiction to review the court of appeals' ruling that petitioners violated S.G.'s Fourth Amendment rights, because that question presents no Article III case or controversy. *See* Argument, Section I, *infra*.

STATEMENT OF THE CASE

Petitioners' Seizure of S.G.[1]

On February 24, 2003, at about 1:00 p.m., a uniformed deputy sheriff with a gun visible in his holster (petitioner James Alford),[2] and an Oregon Department of Human Services ("DHS") investigator (petitioner Bob Camreta) appeared at the Bend elementary school that nine-year-old S.G. attended. *Greene v. Camreta*, 588 F.3d 1011, 1017 (9th Cir. 2009). The sheriff and investigator directed school staff to remove the girl from her class and bring her

[1] The case comes to this Court following rulings on petitioners' summary judgment motions. 588 F.3d at 1020. Consequently, for purposes of this appeal, the facts must be viewed in the light most favorable to respondent.

[2] James Alford has not worked for Deschutes County since 2005, no longer works in law enforcement, and now lives in Arizona. *See* http://www.linkedin.com/pub/james-alford/a/261/2a1 (last visited January 18, 2011). On December 20, 2010, Alford's counsel of record confirmed that Alford is no longer employed with the Deschutes County Sheriff's Office.

to an empty conference room near the principal's office. (J.A.[3] 4, Doc. #53, Exh. D, p. 5) The school employee left S.G. alone, behind closed doors, with the two male strangers. *Id.* Alford and Camreta did not identify themselves to S.G. No one explained to her why she was there (J.A. 71), and she was "too scared to ask [Camreta] any questions." (J.A. 55) Throughout the two-hour interrogation that ensued, S.G. was too frightened even to ask for a glass of water, much less to tell petitioners that she felt sick. (J.A. 55, 58)

Camreta had been assigned to investigate allegations that suggested S.G.'s father might have sexually abused her, allegations the police had reported to DHS in connection with their ongoing criminal investigation of S.G.'s father regarding an unrelated child. 588 F.3d at 1016. Alford joined Camreta at S.G.'s interview "to investigate the criminal half of . . . the investigation." (J.A. 38)

Although Camreta had learned of the allegations regarding S.G. three or four days earlier, *Greene v. Camreta*, 2006 WL 758547 *1 (D. Or. 2006), and the police investigation had been pending for two weeks (Doc. #44, Exh. 2, p. 1), neither Camreta nor Alford spoke to S.G.'s mother, Sarah Greene, before interrogating S.G., so they did not have her consent to the

---

[3] J.A. refers to the Joint Appendix. Doc. # (hereinafter Doc. #) refers to documents in the District Court Docket.

interview.[4] 588 F.3d at 1016. Camreta and Alford also did not know that S.G. suffered from significant developmental delays, particularly in spoken language (J.A. 42), verbal reasoning ability, and overall reasoning. (Doc. #136, Exh. 3) She was eligible for special educational services because of the "communication disorder." *Id.*

Camreta interrogated S.G. while Alford silently observed. (J.A. 60) When Camreta asked S.G. if her father touched her "all over [her] body," she said "yes," referring to affectionate hugs, kisses, and piggy-back rides. (J.A. 71) Camreta then asked "over and over again" if "some of those were bad touches." *Id.* Over and over again, S.G. said "no." *Id.* In response to the frightened nine-year-old's repeated and clear denials of abuse, Camreta "would say, 'No that's not it,' and then ask me [S.G.] the same question again." *Id.* "For over an hour," Camreta repeated "the same questions, just in different ways. . . ." *Id.* In the process, he educated S.G. about child sexual abuse; S.G. had been unfamiliar with the topic. (J.A. 55-56)

S.G. denied all allegations of abuse for almost two hours. (J.A. 48, 54, 55, 57) Towards the end of the school day, she could see through the window blinds that the school buses were arriving to take the

---

[4] Petitioners did not have a warrant or court order, and there were no exigent circumstances justifying a seizure of S.G. 588 F.3d at 1017, 1030 n.17. They also did not speak to Nimrod Greene, S.G.'s father, before interrogating S.G. (Doc. #53, Exh. D, p. 3)

children home. (J.A. 48) S.G. did not believe that she was free to leave the room without Camreta and Alford's permission (J.A. 70-71), and she was correct. (J.A. 40) Fearing that the school bus would leave without her at dismissal time (Doc. #53, Exh. A, p. 25), the frightened child decided to lie, "just to get out of the room." (J.A. 57) She assented to Camreta's leading questions about abuse, "saying yes to whatever he said" (J.A. 71), because, "I had a feeling that's what he wanted to hear, just lies, not truth." (J.A. 57) Camreta and Alford then allowed her to leave. (J.A. 71-72)

S.G. was so upset by the coercive interrogation that she vomited five times that night after returning home. (J.A. 63, 72) She could not eat dinner or even drink Gatorade. (Doc. #53, Exh. B, p. 16)

Since the interrogation, S.G. has repeatedly denied that her father abused her. (*See* Doc. #44, Exh. 11, p. 6; Doc. #53, Exh. C, p. 11; Doc. #65) No recording exists of the interrogation, although Alford had a tape recorder with him[5] (J.A. 39), and no documentation of the specific questions Camreta asked or the specific answers S.G. gave exists. (Doc. #53, Exh. D, p. 5)

---

[5] As a result, the abusive nature of Camreta's questioning has not been preserved. However, counsel's heavy-handed, abusive questioning of S.G. at her deposition was transcribed. (Doc. #53, Exh. C) S.G. testified that Camreta's questioning was even more "scary" and "stern" than counsel's questioning. (Doc. #53, Exh. C, p. 20)

Interview Protocols and the Seizure of S.G.

The current professional literature is rife with expert studies of factors that negatively affect interviews of children, leading to false information. Based upon those studies, numerous experts, including the National Institutes of Health, have set guidelines for forensic interviews in cases of alleged child abuse, especially sex abuse.[6] Oregon, like many states, has adopted official guidelines for interviewing children who may be victims of abuse. *See* Oregon Interviewing Guidelines (2d ed. 2004), available at http://www.doj.state.or.us/crimev/pdf/orinterviewingguide.pdf ("Oregon Guidelines"). The Oregon Guidelines, developed after "a thorough literature review," *id.* at 3, emphasize that investigators should prepare carefully for interviews with alleged victims of child abuse by, *inter alia*, determining whether the child has any developmental delays or other disabilities. *Id.* at 60.

---

[6] Lamb, "Structured forensic interview protocols improve the quality and informativeness of investigative interviews with children: A review of research using the NICHD Investigative Interview Protocol" (2007), available at http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2180422/. *See also, e.g.*, Annon, "Recommended Guidelines for Interviewing Children in Cases of Alleged Sexual Abuse," 6 IPT Journal (1994), available at http://www.ipt-forensics.com/journal/volume6/j6_3_2.htm; "The Role of Law Enforcement in the Response to Child Abuse and Neglect" (1992), available at http://www.childwelfare.gov/pubs/usermanuals/law/index.cfm; Wakefield, "Guidelines on Investigatory Interviewing of Children: What is the Consensus in the Scientific Community?" 24 Am. J. Forensic Psychology 57 (2006) (summarizing and tabulating results from 61 books and articles), available at http://www.ipt-forensics.com/library/ajfp1.htm.

See also id. at 187-95 (importance of identifying special needs). The Guidelines warn that some children will find a police officer's "badge, gun, or radio intimidating," and recommend that [t]he interviewer should be dressed in modest clothes." *Id.* at 43.[7] The child should be told the likely length of the interview. *Id.* at 61-62.

Interviews should be carefully documented, "preferably via audio or video recording." *Id.* at 27, 26, 133. "It is especially critical that evaluations of children with special needs be documented in the most sophisticated manner possible." *Id.* at 191.

The Oregon Guidelines repeatedly emphasize that interviewers must be neutral and guard against actions or questions that, even inadvertently, might communicate bias to the child, *e.g.*, *id.* at 28, 37-39, 43, 63-64, 75-76, 148-49, 168, as "interview bias is consistently associated with high rates of false reports among nonabused children." *Id.* at 38. Therefore, the interviewer should "remain open to the possibility that no abuse occurred," *id.* at 39, and "when children are nondisclosing [of abuse], the interviewer should first consider the possibility that the child was not abused." *Id.* at 167.

---

[7] Federal guidelines completely prohibit interviewers from carrying weapons: "In all child interviews, the officer should remove and secure his/her weapon so that it is out of sight prior to the interview." "The Role of Law Enforcement in the Response to Child Abuse and Neglect" (1992) http://www.childwelfare.gov/pubs/usermanuals/law/index.cfm.

Moreover, the Oregon Guidelines warn that children are likely to respond to any indications that they are not giving the interviewer the information he seeks:

> Children are also socialized to please adults and to avoid challenging or correcting them. If an adult implies knowledge of an event and this knowledge disagrees with the child's memory, the child may report the adult version despite accurate memory . . . and . . . may try to provide answers that make the adult happy. These assumptions about adults are more pronounced with younger children but may still be present to some degree in children as old as 9 to 10. Children may read verbal and nonverbal cues of an adult in order to decide how to please the adult. The importance of avoiding leading questions and preconceived biases is underscored by knowledge of children's social assumptions in the interviewing context. *Id.* at 148.

"Unacceptable tactics" include "leading questions, repeated questioning, . . . or coercing children (e.g. 'You can't leave until you tell me what happened')." *Id.* at 168. Not only do such actions lead to unreliable information, "these tactics may adversely impact the child's mental health." *Id.* at 76. Petitioners'

interrogation of S.G. violated all of those rules, and generated false information from S.G.[6]

Events Leading Up to the Seizure of S.G.

S.G.'s father, Nimrod Greene, came to the attention of law enforcement two weeks before petitioners interrogated S.G., when Greene's employer Franklin Smith, and his wife, Melissa, told police that Greene had touched the genital area of Smith's seven-year-old son, F.S., outside the boy's denim pants.[7] When the police came to investigate, Smith told them that Nimrod had said that his wife, Sarah Greene, had accused Nimrod of molesting his own daughters (S.G. and her five-year-old sister, K.G.) when he was drunk and that she didn't like the girls to lie in bed with him when he had been drinking. (Doc. #44, Exh. 2, p. 1) Despite those alleged statements, the Smiths inexplicably continued to employ and entertain Greene, kept a bottle of vodka in their home solely for Greene, had left Greene alone with their two young sons in the boys' bedroom and, on February 10, 2003, left

---

[6] For an explanation of the relevance of petitioners' violation of the guidelines to the analysis of whether petitioners violated the Fourth Amendment, see Argument, Section II, *infra*.

[7] In Smith's original statement to the police, he claimed that F.S. said that Nimrod Greene had grabbed or squeezed his son's penis, while the child was fully dressed. (Doc. #44, Exh. 2, p. 2) F.S. did not corroborate the allegation, but said only that Greene had grabbed him in the crotch area. *Id.*

Greene alone with F.S. for 20 or 25 minutes. (Doc. #44, Exh. 2, pp. 1-2)

The police arrested Nimrod Greene on February 12, 2003, for touching F.S. Although they were required to report to DHS the allegations that Greene might have abused his daughters, Or. Rev. Stat. §419B.010(1), they did not do so until February 20, 2003, more than a week later. (Doc. #44, Exh. 3, p. 2) DHS investigator Camreta learned that Greene had been released on bail and had returned home to his family. (Doc. #44) Nonetheless he took no action for three more days. Petitioners did not contact the Smiths for additional information about the allegations or the Smiths' knowledge of the Greene family, nor did they question Nimrod or Sarah Greene, or anyone else. As a result, petitioners had no additional information about the allegations, or about the Greene family, before their seizure of S.G. on February 24, 2003.

The Aftermath of Petitioners' Seizure of S.G.

When Camreta and Alford released S.G. from their custody after two hours, S.G., who continued to feel sick, took the bus home. (J.A. 72) When she arrived there, she discovered petitioners in her living room, talking to her mother. *Id.* Because of petitioners' presence, her mother could not console her, and S.G. ran upstairs, nauseated. (J.A. 49, 72; Doc #53, Exh. B, p. 17)

Petitioners told Sarah Greene about the accusations and about the KIDS Center, which would provide sex abuse evaluations for her daughters, including both physical examinations and sensitive age-appropriate questioning by trained social workers and/or psychologists.[10] (J.A. 49) Sarah Greene immediately agreed to take her daughters to the KIDS Center. (J.A. 18)

Petitioners claim that S.G. told them during the interrogation that she would lock her bedroom door in order to escape from her father. (Doc. #44, p. 3) Her mother showed them S.G.'s door, which had no lock. (J.A. 48) After petitioners left, S.G. told her mother about the interrogation, including that she had answered "yes" to questions when the true answer was "no." (Doc. #53, Exh. C, p. 15) Nevertheless, Mrs. Greene promptly attempted to schedule sessions for both daughters at the KIDS Center, attempts which were thwarted by Camreta, who called the KIDS Center to postpone the sessions. (Doc. #53, Exh. B, pp. 18, 19, 26-27)

---

[10] The KIDS Center, like all Child Advocacy Centers, provided child abuse evaluations with a multi-disciplinary team in a non-threatening atmosphere, using non-coercive interviewing techniques. Encouraged by federal law, 42 U.S.C. §13002(a), by 2006 there were more than 600 CACs nationwide, www.ncjrs.gov/pdffiles1/ojjdp/218530.pdf.

Camreta testified before the grand jury which, on March 6, 2003, indicted Nimrod on five counts of sexual abuse of S.G., plus one count of sexual abuse of Smith's son. (Doc. #44, Exh. 4, p. 3) Nimrod Greene was re-arrested the next day. Although Greene was now in jail, preventing any suspected harm from occurring, on March 11, 2003, Camreta removed both girls from their mother's custody. (Doc. #44, p. 6, Exh. 3, pp. 13-14)

The girls remained in foster care for three weeks. (Doc. #44, pp. 6, 8) Despite Sarah Greene's repeated attempts to schedule evaluations at the KIDS Center both before and after the girls were taken into foster care, K.G. was not evaluated there until March 20, 2003, and S.G. was not evaluated until March 31, 2003. (J.A. 67, 68; Doc. #53, Exh. B, p. 27; Doc. #44, Exh. 10, p. 1, Exh. 11, p. 1)

At the KIDS Center, the girls underwent forensic interviews and had physical examinations, all conducted by specially trained professionals. The KIDS Center staff found no evidence that either girl had been sexually abused. (Doc. #44, Exh. 3, p. 1) KIDS staff, however, did recommend that both children receive counseling, including for the trauma they suffered due to being taken from their mother and placed in foster care. (Doc. #44, Exh. 10, p. 17; Exh. 11, p. 18)

On the afternoon of S.G.'s evaluation, the juvenile court ordered that S.G. and K.G. be returned to their mother's custody and dismissed the juvenile

court case. Subsequently, the state dismissed all criminal charges against Nimrod Greene related to his daughters.[11] 588 F.3d at 1020. Nonetheless, S.G. continues to believe that her inability to withstand petitioners' interrogation was the cause of the subsequent disruption of her family's life and her father's prosecution.[12]

---

[11] Maintaining his innocence, Greene submitted an *Alford* plea with respect to a reduced charge against him related to F.S. Sarah Greene explained that the family had been bankrupted by the cost of defending the first trial, and could not afford a second trial. (J.A. 64-65) Also, Nimrod Greene decided to accept a deal offered by the District Attorney because it would not require him to serve time in prison, so he could continue to work and to support the family. *Id.*

[12] "Q. Don't you understand that the reason you can't see your dad right now is because of the abuse?

A. No.

Q. Do you think it has anything to do with the lies you say you told?

A. Yes.

Q. Does that make you feel real bad?

A. Yes. . . .

Q. Do you think that your dad's in trouble now because you lied about him?

A. Yes.

Q. Do you feel real bad about that?

A. Yes." (Doc. #53, Exh. C, pp. 18-19)

Because the district court granted summary judgment to the petitioners, the record is otherwise undeveloped as to the significant emotional harm that petitioners caused S.G.

Proceedings Below

Sarah Greene filed suit under 42 U.S.C. §1983 on behalf of herself and both her daughters, naming petitioners among the defendants.[13] 588 F.3d at 1020. Only one of the claims in that lawsuit is now before this Court – that the seizure of S.G. at her school violated her Fourth Amendment rights.[14] The district court granted summary judgment to petitioners on that claim, ruling both that the seizure was constitutional and that even if it were not, petitioners were entitled to qualified immunity. 2006 WL 758547 at *3-*5.

At the time, the district court was required, under this Court's holding in *Saucier v. Katz*, 533 U.S. 194 (2001), to consider the constitutionality of the petitioners' actions before evaluating qualified immunity. By the time the court of appeals issued its opinion, however, this Court had decided *Pearson v.*

---

[13] Respondents have since moved to Florida, and have no intention of relocating back to Oregon.

[14] In other claims, Greene and her daughters alleged violations of their Fourteenth Amendment rights because (1) Camreta intentionally presented false information to the Juvenile Court to obtain an order to remove the children from Sarah's custody, and (2) both Camreta and the KIDS Center unreasonably interfered with Sarah's right to be with her children and with the children's right to have their mother present during an intrusive medical examination. 588 F.3d at 1020. The court of appeals reversed the grant of summary judgment to Camreta on those claims, *id.* at 1033-37, and petitioners did not seek review of those rulings in this Court.

Callahan, 555 U.S. 223, 129 S. Ct. 808 (2009), which relaxed *Saucier*'s requirements, giving lower courts discretion as to whether to reach the underlying constitutional question before ruling on qualified immunity. *Id.*, 129 S. Ct. at 818. The court of appeals exercised its discretion under *Pearson* to decide whether petitioners in fact violated S.G.'s constitutional rights, before determining, separately, whether petitioners were nonetheless entitled to qualified immunity.

The court of appeals analyzed the constitutional question as petitioners urged it to – by looking to *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), and its progeny, a line of cases that have defined a "special needs" exception to the Fourth Amendment's warrant and probable cause requirements.[15] The court of appeals

---

[15] In this Court, petitioners argue that the court of appeals erred by relying on this line of cases and that it should have instead relied on other cases. Camreta particularly relies on *Terry v. Ohio*, 392 U.S. 1 (1968), and *Illinois v. Lidster*, 540 U.S. 419 (2004). Camreta Brief 9-10; *see also* Alford Brief 15. Yet neither Camreta nor Alford so much as cited *Lidster* in their original appellate briefs, *see* Cam.App.Br. ii-iii (Table of Authorities); Alf.App.Br. iv-viii (same). Camreta mentioned *Terry* only once, when quoting the district court's opinion, Cam.App.Br. 8, and Alford repeatedly referred to the *Terry* holding as synonymous with *T.L.O.* Alf.App.Br. 12, 17, 19. In this Court, Alford relies not only on *Lidster*, but also on three other cases as emblematic of the analysis he now wishes the court of appeals had undertaken: *Virginia v. Moore*, 553 U.S. 164 (2008); *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), and *Wyoming v. Houghton*, 526 U.S. 295 (1999). Alford Brief 21. None of these cases were cited to the court of appeals at *any* stage of the

(Continued on following page)

noted that "despite defendants' heavy reliance upon" *T.L.O.*, in that case this Court "was considering 'only searches carried out by school authorities acting alone and on their own authority.'" 588 F.3d at 1024, quoting 469 U.S. at 341 n.7 This limitation was significant and made *T.L.O.* inapplicable, the court of appeals reasoned, because this "Court's decision in *T.L.O.* was premised on a 'special need' of government not present in this case: 'the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds.'" 588 F.3d at 1024, quoting 469 U.S. at 339. The court of appeals further noted that this Court has recently and repeatedly reiterated "the narrowness of *T.L.O.*" 588 F.3d at 1024, citing *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633, 2639 (2009), and *Ferguson v. City of Charleston*, 532 U.S. 67, 79 n.15 (2001).

The court of appeals also considered petitioners' claim that "the government's 'special need' to protect children from sexual abuse justifies a departure from both the warrant and probable cause requirements in

---

proceedings. More significantly, both Camreta and Alford expressly urged the court of appeals to evaluate S.G.'s seizure pursuant to *T.L.O.* and its progeny. Alf.App.Br. 12-19 (explicitly arguing that the "special needs" doctrine established in *T.L.O.* should apply); Cam.App.Br. 16-20 (repeatedly citing *T.L.O.* and lower courts relying on it). Neither petitioner suggested that a different analysis even existed until they petitioned for rehearing and rehearing *en banc*. Petn. Rehearing. Camreta and Alford now complain that the court of appeals decided the case without considering arguments they themselves failed to make until after the opinion was issued, if they were made at all.

a case such as this one." 588 F.3d at 1026. Reviewing the special needs doctrine, the court noted that this Court consistently requires that the special needs be "'beyond the normal need for law enforcement.'" *id.*, quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987), and that there be "'no law enforcement purpose behind the searches . . . and . . . little, if any entanglement with law enforcement' in conducting them," 588 F.3d at 1027, quoting *Ferguson*, 532 U.S. at 79 n.15. In fact, the court of appeals observed, this "Court hasn't relaxed traditional Fourth Amendment protections when the main purpose of an ostensibly administrative search was to gather evidence for use in subsequent criminal proceedings. . . ." *Id.*

The court of appeals therefore analyzed whether "law enforcement personnel and purposes were too deeply involved in the seizure of S.G. to justify applying the 'special needs' doctrine," and concluded that they were. *Id.* That involvement was both active and specific. The "police were conducting an ongoing investigation of S.G.'s father, and Camreta requested that Deputy Sheriff Alford, a uniformed police officer carrying a visible firearm, accompany him to the interview." *Id.* at 1027. The court of appeals concluded:

> Once the police have initiated a criminal investigation into alleged abuse in the home, responsible officials must provide procedural protections appropriate to the criminal context. At least where there is, as here, direct involvement of law enforcement in an in-school seizure and interrogation of a suspected

> child abuse victim, we simply cannot say, as a matter of law, that she was seized for some 'special need, beyond the normal need for law enforcement.'
>
> In short, applying the traditional Fourth Amendment requirements, the decision to seize and interrogate S.G. in the absence of a warrant, a court order, exigent circumstances, or parental consent was unconstitutional.

Id. at 1030.

Although the court of appeals concluded that petitioners had violated S.G.'s Fourth Amendment rights, it also held that petitioners were entitled to qualified immunity. *Id.* at 1030-33. Therefore, the court of appeals affirmed the district court's judgment in petitioners' favor. Petitioners nonetheless petitioned for certiorari, seeking review of whether the court of appeals' Fourth Amendment ruling was correct.

SUMMARY OF ARGUMENT

I. The court of appeals' ruling that petitioners' seizure of nine-year-old S.G. violated her Fourth Amendment rights is not reviewable because it was not part of that court's judgment. This Court reviews judgments, not opinions. *California v. Rooney*, 483 U.S. 307, 311 (1987). In addition, petitioners cannot appeal because they prevailed in the court of appeals. Only an aggrieved party may appeal from a

judgment. *Deposit Guarantee Nat. Bank v. Roper*, 445 U.S. 326, 333 (1980). Petitioners and the United States rely on an exception to this principle for appeals of rulings that are "collateral to the judgment on the merits." 445 U.S. at 334. Here, however, the Fourth Amendment ruling goes to the heart of the merits. *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939), upon which the United States relies, is not to the contrary. There, this Court approved a purely technical amendment to the judgment decree issued by the district court in a case in which they prevailed. But this Court expressly held that review of the merits would be inappropriate.

This Court also has no jurisdiction over petitioners' appeals from the Fourth Amendment ruling because those appeals present no Article III case or controversy. The dispute here is moot, as petitioners present only a hypothetical dispute about the law. Regardless of the outcome in this Court, respondent can gain nothing from petitioners. Petitioners likewise have no personal stake in the outcome and so lack standing. Petitioners implicitly concede this point by focusing all their arguments for standing on the interests of the Deschutes County and the State of Oregon, neither of which are parties here. The United States also fails in its efforts to manufacture an Article III dispute. In particular, its attempt to liken statements in an appellate opinion to a declaratory judgment or an injunction "running against the government as a whole" (U.S. Brief 13), are unavailing. *See, e.g., Hewitt v. Helms*, 483 U.S. 755, 758-59

(1987) (rejecting the notion that a "judicial pronouncement" without effect on "the behavior of the defendant towards the plaintiff" can be characterized as a declaratory judgment). Indeed, if this Court were to accept the United States' argument, any government official whose job might be affected by a ruling would have standing to appeal. Such a dramatic expansion of appellate standing is both implausible and undesirable.

Petitioners rely principally on *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808 (2009) to support their plea for review, arguing that *Pearson* allows for appeals in a situation, like this one, where a lower court finds that official defendants violated the plaintiff's constitutional rights but also holds that those defendants are protected by qualified immunity. *Pearson*, however, says nothing of the kind, and it even discusses the difficulties such defendants would face in trying to appeal. *Id.* at 820. Moreover, this Court will ultimately be able to decide the underlying constitutional issues presented in such cases; the issues are likely to recur in numerous cases and in different postures that this Court unquestionably can decide.

If this Court declines to review the Fourth Amendment ruling, that ruling should remain intact. *Karcher v. May*, 484 U.S. 72 (1987) (ruling remains intact when losing party does not appeal). The ruling likewise must remain intact should this Court dismiss the writ as improvidently granted.

II. Petitioners violated S.G.'s Fourth Amendment rights through their custodial interrogation of her. There is no dispute that petitioners seized S.G., nor is there any dispute that S.G. was suspected of no wrongdoing. The history of the Fourth Amendment, which is where the constitutional inquiry begins, establishes that the seizure was unconstitutional. At the Founding, witnesses could be compelled to speak only upon an order from a magistrate. As a result, the seizure of S.G. violated the Fourth Amendment.

Even without such historical evidence, the traditional requirements of the Fourth Amendment – a warrant and probable cause – apply here. Child abuse investigations are prime examples of the situations in which a neutral magistrate's review of the evidence is particularly valuable. Like petitioners here, officials may overreact to allegations or intimations of child abuse, perhaps with the best of intentions. *Cf. Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978) (noting the dangers of "devolv[ing] almost unbridled discretion upon executive and administrative officers, particularly those in the field."). Likewise, the familiar standard of probable cause applies here. Petitioners' seizure of S.G. was not the sort of brief and spontaneous stop that this Court has occasionally approved on the lower standard of reasonable suspicion. *Terry v. Ohio*, 392 U.S. 1 (1968) (reasonable suspicion), but was a two-hour planned interrogation of a terrified nine-year-old girl.

None of this Court's cases, including *Illinois v. Lidster*, 540 U.S. 419 (2004), suggest that an amorphous reasonableness standard applies whenever officials detain witnesses rather than suspects. To the contrary, *Lidster* evaluated numerous features of the traffic stop at issue in that case, including that it was extremely brief, and that the questioning, equivalent to asking a person on the street for information, was minimal and not "likely to provoke anxiety or to prove intrusive." *Id.* at 424. Here, in contrast, petitioners not only traumatized S.G., but their questions intruded on her private family life and on Sarah Greene's constitutionally-protected interests in controlling her child's education and interactions with other adults.

This Court's "special needs" doctrine likewise does not support petitioners. Law enforcement was deeply involved in S.G.'s seizure, which alone renders the special needs doctrine inapplicable. *Ferguson v. City of Charleston*, 532 U.S. 67, 81 n.5 (2001). In addition, the seizure here is entirely different from the circumstances in which this Court has applied the special needs doctrine. Unlike other special needs cases not involving probationers or parolees, S.G. and her mother consented to nothing. Moreover, the school-based special needs cases rely entirely on rationales not present here: school officials' need to maintain order and discipline and the impracticality of expecting school officials to get a warrant when confronted with rebellious, even dangerous, students.

Even under the reasonableness-balancing test petitioners propose, the seizure of S.G. is unconstitutional. The seizure here was highly intrusive. There are, moreover, several important public interests at stake in such a seizure – not only the government interest in detecting child abuse, but also an interest in obtaining accurate results from its investigations, an interest in not needlessly breaking families apart, and an interest in minimizing trauma to children who are being interviewed. Most significant, however, is that the petitioners' custodial interrogation of S.G. served *none* of the interests at issue. Not only did it traumatize the child and her family, but interviews of this type lead to highly unreliable information. With such unreliable information, officials are at grave risk *both* of needlessly removing children from their parents *and* of being unable to protect children from abuse because the information obtained is not reliable. The State of Oregon itself acknowledges these realities. The State has adopted Guidelines for Interviewing Children consistent with widely accepted recommendations that expressly counsel against the heavy-handed tactics used by petitioners. And the State has created, with federal support, multidisciplinary centers where suspected victims of abuse can be interviewed in an appropriate manner. One, the KIDS Center, was available to petitioners and S.G. was eventually evaluated there, where no evidence of abuse was found. Despite that available resource, petitioners unaccountably decided to interrogate S.G. at her school, in violation of numerous

protocols and recommendations. For all of these reasons, their conduct was unreasonable and therefore unconstitutional, even under the standard they themselves promote.

Camreta in fact does not even defend his conduct during the interview. Instead, he asks this Court to decide only the hypothetical question of whether this interview – or in fact *any* school based interview to investigate an allegation of child abuse – was constitutional at its inception. Camreta Brief 34. Nothing in this Court's precedents supports Camreta's plea to bifurcate the reasonableness inquiry by looking only at the seizure's inception and not at its scope. Nor does the case law support giving officials such broad authority to seize children in schools, even with the best of intentions. Most notably, however, even looking at Camreta's conduct before he spoke a word to S.G., the seizure was unreasonable. He failed to prepare for the interview in any way, failed to do the most minimal of investigations before interrogating her, and failed to take advantage of the available resources – notably the KIDS Center – that could have both protected S.G. and her family from unnecessary trauma and produced reliable information about whether she was being abused.

ARGUMENT

I. THE COURT OF APPEALS' RULING THAT PETITIONERS' SEIZURE OF S.G. VIOLATED HER FOURTH AMENDMENT RIGHTS IS NOT REVIEWABLE AND SHOULD BE LEFT INTACT

A. The Court of Appeals' Fourth Amendment Ruling Is Not Reviewable Because It Was Not Part of That Court's Judgment and Because Petitioners Prevailed by Virtue of That Judgment

This Court "reviews judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam), quoting *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956). But in asking this Court to review the Fourth Amendment ruling, which was not part of the judgment that the court of appeals entered *for them* when it held that they were entitled to qualified immunity, petitioners are asking this Court to do precisely what that principle forbids:[16]

---

[16] In *Rooney*, the police searched the trash bin at Rooney's apartment building. 483 U.S. at 309. Based on evidence found in the trash, and other evidence, the police obtained a search warrant for his apartment. Rooney moved to suppress the evidence found in his apartment, as the fruit of an unconstitutional search. The California Court of Appeal agreed with Rooney that the trash search was unconstitutional, but held that there was, nonetheless, enough valid evidence supporting the search warrant. It therefore denied the motion to suppress. The State of California appealed to this Court, asking for review of the ruling with respect as to the trash search, but did not challenge the judgment, which had approved the search

(Continued on following page)

"that the Court of Appeal reached its decision through an analysis different than this Court might have used does not make it appropriate for this Court to rewrite the [lower] court's decision, or for the prevailing party to request us to review it." 483 U.S. at 311. Similarly, the court of appeals' use of analysis that may be adverse to the non-parties' long-term interests (*see* Camreta Brief 43-44), even while the court was ruling for petitioners, does not allow the non-parties State and County to, in effect, appeal from the court's Fourth Amendment "analysis."

Because they *prevailed* in the court of appeals, petitioners cannot appeal. Only an aggrieved party may appeal from a judgment. *Deposit Guarantee Nat. Bank v. Roper*, 445 U.S. 326, 333 (1980). Petitioners and the United States attempt (Camreta Pet. 29; Alford Brief 4, n.1; U.S. Brief 15-21) to rely upon an exception to this rule: that "[i]n an appropriate case, appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits," *Roper*, 445 U.S. at 334. The "collateral" requirement derives from *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). But "'collateral to' the merits" under *Cohen* and its progeny means "'*completely* separate from the merits of the action.'" *Puerto Rico Aqueduct*

---

warrant. *Id.* at 309-11. This Court granted certiorari, *see id.* at 308, but ultimately dismissed the writ as improvidently granted, in part on the ground that the "trash-search issue . . . has never been the subject of an actual judgment," *id.* at 314.

& Sewer Authority v. Metcalf & Eddy, Inc. 506 U.S. 139, 144 (1993) (citation omitted, emphasis added). Thus, in *Roper*, this Court identified the decision whether to grant class certification as the type of "*procedural* ruling [that is] collateral to the merits of a litigation." 445 U.S. at 336 (emphasis added).

In this case, in contrast, the ruling that petitioners seek to appeal was at the very heart of S.G.'s case: "a claim that . . . [her Fourth Amendment] rights have been violated," *Mitchell v. Forsyth*, 472 U.S. 511, 527-28 (1985) (defining a "merits . . . claim" as calling for "consider[ation] [of] the correctness of the plaintiff's version of the facts, . . . [and] determin[ation] [of] whether the plaintiff's allegations . . . state a claim [for relief]"; distinguishing collateral claim as calling for neither).

The United States relies on *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939), to argue that the Fourth Amendment ruling was "collateral." But in *Electrical Fittings*, the relief sought was deletion of a portion of the district court's final decree adjudging a patent both valid and not infringed. *Id.* at 242. The petitioners, who were defendants below, asked to have the decree amended so that it no longer included a judgment of the validity of the patent held by respondents, plaintiffs below. *Id.* The *Electrical Fittings* petitioners did *not* ask, as petitioners do here, for this Court to review the merits of the lower court's legal determinations about the validity of plaintiff's patent. The *Electrical Fittings* petitioners requested only that the district court's final *judgment*

be amended so that it did not mention the patent's validity, asking the appellate court to address a purely technical error – or, as this Court put it in *Roper*, a "procedural error." 445 U.S. at 335 n.7.[17] The *Electrical Fittings* court held that appellate jurisdiction existed *only* for the technical correction and "*not* for the purpose of passing on the merits," 307 U.S. at 242 (emphasis added).

B. The Court of Appeals' Fourth Amendment Ruling Is Not Reviewable Because the Appeals Present No Article III Case or Controversy

1. The Dispute Petitioners Bring to This Court Is Moot

The Fourth Amendment dispute is moot because S.G., in deciding *not* to petition for certiorari from the judgment against her, abandoned that claim. S.G. can gain no relief on her Fourth Amendment claim from petitioners, regardless of any ruling this Court might make. It follows that there is no live case or controversy. *See Lewis v. Continental Bank Corp.*, 494 U.S.

---

[17] In *Roper*, this Court explained that the *Electrical Fittings* district court had been "correct in inquiring fully into the validity of the patent . . . but incorrect to adjudge the patent valid after ruling that there had been no infringement." *Id.* (internal citation omitted). In contrast, the court of appeals here engaged in an analysis that this Court has expressly authorized – deciding the constitutional question first and thereafter reaching the question of qualified immunity. *See Pearson*, 129 S. Ct. at 818.

472, 478-79 (1990) (dispute is not alive when "no matter how the Commerce Clause issues in this suit are resolved, [Continental's] application can constitutionally be denied"); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) ("federal courts are without power to decide questions that cannot affect the rights of the litigants in the case before them") ("To be cognizable in a federal court, a suit . . . 'must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts'"). *See also* C. Wright, A. Miller, E. Cooper, 13B Federal Practice and Procedure §3533 (updated through 2010) ("Some of the easiest mootness principles apply to cases in which plaintiff abandons requests for relief.").

To be sure, petitioners continue to dispute the correctness of the court of appeals' ruling that their seizure of S.G. violated her rights. But as this Court recently and unanimously explained, a "contin[uing] . . . dispute about the lawfulness of State action" does not alone make for an Article III case or controversy. *Alvarez v. Smith*, 130 S. Ct. 576, 580 (2009). The government seized personal property from the *Alvarez* plaintiffs, who contended that "the failure of the State to provide a speedy postseizure hearing" violated their due process rights. *Id.* at 579. By the time the case reached this Court, all plaintiffs had either resolved or abandoned the underlying claims regarding their property. Since they had not sought damages in their original complaint, they had no active claim

for relief. *Id.* at 578-79. The case was therefore moot. Even though "[t]he parties . . . continue to dispute the lawfulness of the State's hearing procedures . . . that dispute is no longer embedded in any actual controversy about the plaintiffs' particular legal rights, [but is] [r]ather . . . an abstract dispute about the law. . . ." *Id.* at 580.

Even though petitioners here, as in *Alvarez*, continue to insist on "the lawfulness of State action," *id.* at 580, and to "dispute" (*id.*) the court of appeals' determination that they violated S.G.'s Fourth Amendment rights,[18] the same mootness conclusion is

---

[18] Respondent's choice to argue in the alternative that the court of appeals' ruling was correct does not create a live case or controversy. Both parties in *Alvarez* argued against mootness and both sought a ruling on the merits. Official Oral Argument Transcript at 5, 34, available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-351.pdf. That argument did not make the dispute any more concrete.

The United States suggests that this Court has "heard and decided numerous cases in which the non-appealing party has little or no interest in defending the . . . judgment." U.S. Brief 18. But the one decision of this Court that it cites for that proposition, *Pacific Bell Tel. Co. v. Linkline Communications, Inc.*, 129 S. Ct. 1109 (2009), was a case in which the Court ruled that, notwithstanding respondent's failure to defend the judgment, it continued to have a substantial interest in the outcome of the case that was "adverse" to that of petitioner, "not only in the litigation as a whole, but in the specific proceedings before this Court." *Id.* at 1117. The United States' reliance (U.S. Brief 18) on cases in which this Court has appointed amici to defend the court of appeals' judgment is also misplaced. In those cases, the respondent retained a substantial stake, but disagreed with what the court of appeals had said about that stake, thus

(Continued on following page)

compelled by understanding that the dispute here is entirely divorced from "any actual controversy about the plaintiffs' particular legal rights," *id.*: Both petitioner Camreta and the United States implicitly concede this point, as they urge this Court to decide whether petitioners' actions were constitutional. *See* Camreta Brief 39 ("reasonableness of the scope of th[e] seizure [of S.G.] . . . including whether the [two-hour] interview of S.G. was reasonable . . . depends on the resolution of heavily disputed facts . . . [and] that resolution should not occur in this case"); (U.S. Brief 32) ("This Court need not decide . . . whether the [two-hour] interview in this case was conducted in a reasonable manner")).

Moreover, the "dispute about the law" in *Alvarez* was between *parties*, the State's Attorney on the one hand and plaintiff property owners on the other. In contrast, the "dispute about the law" here is, under *petitioners'* theory of standing and as discussed below, between the State of Oregon and Deschutes County on the one hand and unidentified children on the other, none of whom are parties to this case. And unlike respondents in *Electrical Fittings*, on which the United States relies, S.G. has no on-going personal interest in the resolution of this dispute. The *Electrical Fittings* respondents had an obvious interest

---

requiring appointment of an amicus to defend the court of appeals' judgment in whole or in part. *See Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1243 (2010); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 226 n.1 (2002).

in retaining a judgment that their patent was valid. In contrast, it is exceedingly unlikely that S.G. ever will be subjected to a child welfare investigation again, much less at the hands of petitioners; as she is almost 18 and no longer lives in Oregon.

2. The Court of Appeals' Fourth Amendment Ruling Is Not Reviewable Because Petitioners Lack Standing

"[T]he case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate. . . . *[T]he parties must continue to have a 'personal stake in the outcome' of the lawsuit.*" *Lewis*, 494 U.S. at 478-79 (citation omitted) (emphasis added). *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 543-44 (1986) ("no personal stake in the outcome of the litigation and therefore . . . [no] standing to file the notice of appeal").

Petitioners effectively concede that they personally lack standing to seek review of the Fourth Amendment ruling by focusing exclusively on harm that might come to *the State and the County,* as if the State and the County had been substituted as party petitioners for Camreta and Alford respectively. Camreta Brief 43 ("State of Oregon . . . appears on Camreta's behalf here");[19] (Alford Brief, *passim* (never

---

[19] Oregon's decision to indemnify its employees (*see* Camreta Brief 43, n.6) is not tantamount to assuming party status in a federal court lawsuit. If it were, then such indemnification would

(Continued on following page)

suggesting that Alford individually has any interest in review of Fourth Amendment ruling, in contrast to the "[county] government," which allegedly does)). Petitioners' failure even to argue that they have a personal stake in this case – despite their knowledge that reviewability is at issue – alone dooms their pleas for review. *See Bender*, 475 U.S. at 542 (explaining, with respect to appellate standing, that "at an irreducible minimum, Art. III requires the party who invokes the court's authority to show that he personally has suffered some actual or threatened injury") (internal quotation marks and citations omitted).

Moreover, the State and the County themselves cannot appeal because they are not parties.[20] This

---

constitute an implicit back door waiver of the State's Eleventh Amendment immunity, when this Court's decisions require that a State's consent to suit in federal court – its waiver of its Eleventh Amendment immunity – must be "unequivocally expressed." *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 (1984). *See Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944).

[20] S.G.'s complaint originally joined the County as a party defendant to her Fourth Amendment claim on a *Monell* theory. (J.A. 12, 26) The County argued, however, that "there is no evidence of an official policy, custom or practice [giving rise to the interrogation to which S.G. was subject and] adopted by Deschutes County." County Mem. in Support of Summary Judgment (Doc. #47, p. 17) The district court agreed, and granted summary judgment to the County on the Fourth Amendment claim against it. *Greene v. Camreta*, 2006 WL 758547 *5 (D. Or. 2006).

Now the County seeks to have it both ways. In seeking this Court's review, Alford, whom the County apparently views as its

(Continued on following page)

Court has long held that "one who is not a party or has not been treated as a party to a judgment has no right to appeal therefrom." *Karcher v. May*, 484 U.S. 72, 77 (1987). *See Bender*, 475 U.S. at 545 (school board member sued in his official capacity "not permit[ted] . . . to 'step into the shoes of the Board' and invoke its right to appeal"). Petitioners cannot claim standing based on the alleged interests of non-parties Oregon and Deschutes County.

---

alter ego, took the opposite position from the one the County had successfully argued in the district court, not only conceding the existence of the policy it had said there was "no evidence" of, but trumpeting the policy's existence as a reason *for* granting the writ. Alford Pet. 14-15. Noting those inconsistent positions, on December 2, 2010, respondent's trial counsel filed in the district court "Plaintiff's Amended Motion for Relief From Judgment As to Defendant Deschutes County." In that Rule 60 motion, respondent invoked the doctrine of judicial estoppel to seek reinstatement of the County as a party defendant to S.G.'s Fourth Amendment claim. On January 4, 2011, the district court denied the Rule 60 motion as premature, but without prejudice to its renewal after this Court rules in this case. (Doc. #139)

Counties do not enjoy qualified immunity in §1983 cases. *Owen v. City of Independence, Mo.*, 445 U.S. 622 (1980). *If* the County, after this Court's decision, is eventually reinstated as a defendant in this action, and *if* the Fourth Amendment issue is eventually decided against it in the court of appeals, and *if*, at that stage, it decided to seek review of such a ruling in this Court, then, as a party to the case, it could do so without any question being raised as to reviewability. That possibility is an additional prudential reason for this Court to decline to review the Fourth Amendment ruling. *See Rooney*, 483 U.S. at 313 ("too many 'ifs' in that proposition to make our review appropriate at this stage").

Nor would the alleged interests of the State and the County be sufficient to support standing even if they were parties. Petitioners argue that the State and the County have concerns about the effect of the Fourth Amendment ruling on their conduct, or their employees' conduct, going forward. *See* Camreta Brief 43-44 ("State of Oregon . . . bound by the Ninth Circuit's constitutional ruling *in future cases*"; "absent the ability to seek further review in this case, . . . [State] must either comply with what it believes to be an erroneous decision or . . . incur significant liability"). *Accord,* Alford Brief 12 (same for "responsible officials"). The "'stake in the outcome' of the lawsuit," *Lewis,* 494 U.S. at 478-79, that the State and the County claim is thus not a stake in *this* lawsuit. *See id.* at 479 ("Article III question is not whether the requested relief would . . . [have an effect] as to the world at large, but whether [respondent] Continental [Bank] has a stake in that relief"). Such a hypothetical concern does not give rise to Article III standing. *See* II.F., *infra*.

Unlike petitioners themselves, the United States alleges that petitioners personally have standing to appeal to this Court: "[p]etitioners in this case have standing to challenge the court of appeals' constitutional ruling because it effectively prohibits them from job-related activities" and "routine investigative technique[s]" that they "would otherwise engage [in]." U.S. Brief 9, 16. But the United States cites nothing to support its claim. Standing cannot be based solely on the factually unsupported statements of an amicus. Moreover, any burden that petitioners

face is just as hypothetical as those supposedly faced by the State and County – the possibility that in some future case, their conduct might be affected by their concern about liability. This "burden" is so hypothetical that neither Camreta nor the United States actually wants this Court to determine whether petitioners' actions were unconstitutional.[21]

For similar reasons, the United States' attempt to compare petitioners' interests here to the interests of petitioners in *Electrical Fittings* fails. The United States argues that the adverse consequences to petitioners here – being prevented from using a

---

[21] The possibility that petitioners themselves or similarly situated State investigators and County sheriffs would, in some future child abuse investigations, be inclined to resort to the interrogation practices the court of appeals found unconstitutional appears extremely remote, in light of the 2004 Oregon Guidelines (discussed in II.E.3, *infra*), which, if followed, would rule out such practices. To be sure, the record below is devoid of any evidence respecting the impact of these Guidelines, which were promulgated after the custodial interrogation of S.G. But the very absence of such evidence shows that what petitioners are asking for is an advisory opinion on whether they may violate their State's own guidelines. This Court may not issue "advisory opinions in a controversy which has not arisen," *Coffman v. Breeze Corp.*, 323 U.S. 316, 324 (1945) (citing many cases).

Additionally, Alford may not, as a factual matter, legitimately claim standing. Alford no longer works for Deschutes County or in law enforcement. *See* n.2, *supra*. It is therefore extremely unlikely that Alford will ever again participate in a child abuse investigation. *See* U.S. Brief 19 (conceding that a government official in petitioner's position may lack standing to appeal if "there is insufficient likelihood that he will again engage in the practice that has been ruled unconstitutional").

particular "investigative technique" – "are substantially more certain and imminent than the concerns about 'unspecified future litigation' asserted by the appellants in *Electrical Fittings*." U.S. Brief 16-17 (quoting *Roper*, 445 U.S. at 337). The *Roper* court explained, however, that the *Electrical Fittings* petitioners had shown that they had a "personal stake in the appeal required by Art. III," sufficient to establish their standing to seek review of the court of appeals' ruling there. *Roper*, 445 U.S. at 337. Here, in contrast, not only does neither petitioner meet his burden of establishing his "personal" stake, but neither even argues that he has one.

At the heart of the United States' argument for reviewability is the remarkable contention that the Fourth Amendment ruling is the equivalent of "an injunction or declaratory judgment *against the government as a whole*." U.S. Brief 13 (emphasis added). Elsewhere, the United States describes the court of appeals' opinion as an "injunction-like notice" that effectively enjoins "all similarly situated officials" within the Ninth Circuit, with disobedience to the "injunction" resulting in these officials becoming "personally liable for damages." U.S. Brief 9. This argument is an attempt to invest petitioners with sufficient personal interest to meet Article III's requirements.

This Court has already rejected the notion that a ruling in an appellate opinion that affords no relief can be the functional equivalent of a declaratory judgment. In *Hewitt v. Helms*, 482 U.S. 755, 758-59

(1987), as here, the court of appeals had found that a plaintiff's constitutional rights had been violated, but that the defendants had qualified immunity from liability for damages. The plaintiff sought attorneys' fees as a prevailing party, arguing that the statement that his rights had been violated "was at least the equivalent of a declaratory judgment." *Id.* at 761. This Court rejected the argument, noting that what makes "a judicial pronouncement . . . a proper judicial resolution of a 'case or controversy' rather than an advisory opinion[,] is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*" *Id.* at 761 (emphasis in original). The lower court's "statement of law," *id.* at 763, in *Hewitt* may have given the plaintiff some "moral satisfaction," *id.* at 762, but such a statement is "not the equivalent" of a declaratory judgment and is "not appealable in the same manner as . . . entry of a declaratory judgment." *Id.* at 763.

The notion that the Fourth Amendment ruling here is the functional equivalent of an injunction is equally without merit. The court of appeals did not enjoin anything, and its Fourth Amendment ruling bears none of the indicia of an "injunction" described in Fed. R. Civ. P. 65(d). Like a declaratory judgment, moreover, an injunction is entered upon a finding that a defendant is liable, whereas here the court of appeals ruled that defendant petitioners were *not* liable. Further, an injunction requires a defendant to take or not to take particular actions *with respect to the plaintiff*. *See City of Los Angeles v. Lyons*, 461

U.S. 95, 101-07 (1983) (injunction will not issue absent showing that *plaintiff* is likely to suffer future injury as a result of the acts sought to be enjoined, and that injunction will consequently prevent likely injury). The Fourth Amendment ruling does not direct petitioners (much less "similarly situated officials" or "the government as a whole" (U.S. Brief 9, 13)), to do or refrain from doing anything as to S.G. Nor could S.G. seek any remedy for a "violation" regarding an unrelated child. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 112 (1969).

The United States' likening of statements of law in an appellate opinion as being functionally equivalent to a declaratory judgment or an injunction "against the government as a whole," (U.S. Brief 13), or even against just the governments within the Ninth Circuit (Camreta Brief 43-44), would confer standing to appeal here on, for example, child welfare investigators or law enforcement officers in Hawaii or Alaska similarly situated to petitioners, the predicate for the latters' standing being, under the United States' theory, the same as its predicate for petitioners' own standing: all would be bound by or subject to the (supposed) injunction or the (supposed) declaratory judgment the court of appeals has issued. The United States is therefore urging, albeit implicitly, a vast expansion of appellate standing, and an overturning of the rule that standing to appeal adverse appellate judgments is always restricted to parties only, no matter what *stare decisis* effect the judgment and accompanying decision may have on non-parties,

see Karcher, 484 U.S. at 77, results that would have staggering implications for this Court.

C. Denying Review of the Fourth Amendment Ruling Is Consistent with *Pearson v. Callahan*

In dissenting from the denial of certiorari in *Bunting v. Mellen*, 541 U.S. 1019, 1022 (2004), Justice Scalia, joined by Chief Justice Rehnquist, characterized the mandatory order of decision rule in *Saucier v. Katz*, 533 U.S. 194 (2001) (constitutional question first, then qualified immunity), as having created a "procedural tangle." Justice Scalia proposed a fix, or, more precisely, *alternative* fixes to the described "tangle": [w]e should *either* make clear that constitutional determinations are not insulated from our review . . . , *or* else drop any pretense at requiring the ordering in every case [as *Saucier* mandates]." *Id.* at 1025 (emphasis added). Justice Stevens, writing for himself and Justices Ginsburg and Breyer, favored the alternative that would relax the *Saucier* rule. *Bunting*, 541 U.S. at 1019 ("Relaxing that [*Saucier*] rule could solve the problem that Justice Scalia addresses in his dissent.").

The fix that five members of this Court subscribed to in *Bunting* – relaxing the mandatory *Saucier* rule so that it became optional - became the law in *Pearson*. 129 S. Ct. at 818. The *Pearson* Court thereby adopted the second of the two alternative fixes Justice Scalia had prescribed in *Bunting*, *i.e.*, "dropping

any pretense at requiring the [*Saucier*] ordering in every case." 541 U.S. at 1025 (Scalia, J., dissenting).

Petitioners now read the *Pearson* court *also* to have adopted the first of Justice Scalia's alternative fixes: permitting this Court's review of the constitutional determinations in every qualified immunity case. Camreta Brief 41-44. But *Pearson* itself does not say anything like that. To the contrary:

> Where a court holds that a defendant committed a constitutional violation but that the violation was not clearly established, the defendant may face a difficult situation. As the winning party, the defendant's right to appeal the adverse holding on the constitutional question may be contested.

Pearson, 129 S. Ct. at 820.

In this context, petitioners' reading of *Pearson* understands it to overturn, *sub silentio* and despite the language just quoted, this Court's "settled [practice]" of refusing to entertain an appeal by prevailing party to a judgment. *See Bunting*, 541 U.S. at 1023 (Scalia, J., dissenting). It is implausible, however, that the *Pearson* court overturned such a longstanding and well-known principle without clearly saying so. *See Steel Co. v. Citizens For a Better Environment*, 523 U.S. 83, 98 (1998) (prior decision "not meant to overrule, *sub silentio,* two centuries of jurisprudence").

The United States says that if this Court were not free to review rulings such as the Fourth Amendment ruling below, then that would greatly

retard the "'development of constitutional precedent,'" (U.S. Brief 12) (citation omitted) and "'be unfair to the litigant [seeking such review],'" *id.* at 20 (citing *Bunting*, 541 U.S. at 1024 (Scalia, J., dissenting from denial of certiorari)). However, "the development of constitutional law is by no means entirely dependent on cases in which a defendant may seek qualified immunity," in that "most of the constitutional issues . . . presented in §1983 damages actions and *Bivens* cases also arise in cases in which that defense is not available." *Pearson*, 129 S. Ct. at 821-22. Further, this Court's review of constitutional rulings often will not be foreclosed in qualified immunity cases when the losing plaintiffs in the courts of appeals, unlike respondent here, seek review of the qualified immunity rulings adverse to them. In such cases, the winning government officials can present constitutional arguments as an alternative ground of affirmance, giving this Court an opportunity to review those rulings.

D. The Fourth Amendment Ruling Should Be Left Intact

When, as here, "the controversy [in a case] ended when the losing party . . . declined to pursue its appeal," this Court dismisses the appeal for want of jurisdiction and the lower court ruling is left intact. *Karcher*, 484 U.S. at 83. Indeed, a contrary rule, which would require or allow vacatur of a constitutional ruling (favorable to a plaintiff) where the lower court found the defendant to have qualified immunity,

would completely undermine *Pearson*. Lower courts would have little reason to exercise their discretion to decide constitutional questions – at least in ways unfavorable to government defendants – before deciding qualified immunity if an immune defendant could, simply by appealing, obtain a vacatur of an unfavorable constitutional ruling from a higher court. And such a rule would open the floodgates to appeals and petitions for certiorari by victorious but still unhappy defendants.

If this Court chooses to dismiss the writ of certiorari in this case as improvidently granted, the lower court judgment likewise remains intact. *See Mincey v. Arizona*, 437 U.S. 385, 404 (1978) (Marshall, J. concurring). Dismissing the writ as improvidently granted would be consistent with this Court's decisions. *See Nike, Inc. v. Kasky*, 539 U.S. 654, 661-62, 664 (2003) (petitioner lacked "standing to bring the case to this Court," because the "judgment" it sought review of did not "cause[ ] direct, specific, and concrete injury" to it; resolution of constitutional question presented would be assisted by "development" of "full factual record" (Stevens J., concurring in dismissal of writ, for himself, Justice Ginsburg, and, in part, Justice Souter); *Jefferson v. City of Tarrant, Ala.*, 522 U.S. 75, 80-85 (1997) (jurisdictional defect); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 118 (1994) ("constitutional question that may be entirely hypothetical"); *Montana v. Imlay*, 506 U.S. 5 (1992) ("no matter which party might prevail in this Court, . . . respondent's term of imprisonment will be the

same"; [both] counsel . . . are seeking "advisory opinion[s]") (Stevens, J, concurring); *Rooney*, 483 U.S. at 311 (petitioner prevailed below); *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 183-84 (1959) (resolution of question as to which review had been granted appeared unlikely to have a significant impact on resolution of dispute between parties).

II. PETITIONERS VIOLATED S.G.'S FOURTH AMENDMENT RIGHTS

The court of appeals decided only a narrow question – whether an armed, uniformed sheriff's deputy and a child protective services worker violated the Fourth Amendment when they seized a nine-year-old girl, confined her in a room alone with them, and interrogated her for two hours about whether her father had sexually abused her, all without a warrant, court order, parental consent, or the presence of exigent circumstances. 588 F.3d at 1015. The court of appeals explicitly noted the involvement of the armed deputy sheriff: "The facts of this case do not require us to decide whether the 'special needs' doctrine would apply to an in-school interrogation of a child where there is no direct law enforcement purpose and no involvement of law enforcement personnel." *Id.* at 1027 n.12.

Petitioners and the United States, however, ask this Court to decide a Fourth Amendment question that is much broader than the court of appeals' ruling. They ask this Court to hold that "officials are not

categorically barred from conducting in-school interviews of suspected child-abuse victims in the absence of a warrant, . . . exigent circumstances, or parental consent." U.S. Brief 32; *see* Alford Brief 64; Camreta Brief 44. But the court of appeals did *not* hold to the contrary. Specifically, it did not consider either the constitutionality of in-school interviews that did not amount to seizures, or interviews conducted by child protective services investigators alone, without the presence of armed police officers and absent a law enforcement purpose. *See* 588 F.3d at 1022, 1027 n.12. Likewise, the court of appeals did not consider whether officials are "categorically barred from conducting in-school interviews," *id.* at 1025, but merely rejected petitioners' claim that such interviews are *always* constitutional. *Id.* at 1023.

While petitioners and the United States ask this Court to review the court of appeals' Fourth Amendment ruling, Camreta and the United States seek review of only a truncated version of the issue before the Court. They seek a ruling on the constitutionality of petitioners' seizure of S.G. only at its "inception" (Camreta Brief 10-11, 39; U.S. Brief 22 n.3), *i.e.*, without regard to its scope and duration. Yet, as respondent will demonstrate, this Court's precedents offer no support for such a truncated inquiry. And in concluding that petitioners violated S.G.'s Fourth Amendment rights, the court of appeals evaluated their conduct not merely at the "inception" of the seizure, but for the entire two-hour period that they

confined her in a room and interrogated her. 588 F.3d at 1022.

Alford modifies the issue before this Court by framing the Fourth Amendment issue as involving the custodial interrogation of a child whom he "reasonably suspect[ed] was being sexually abused by her father." Alford Brief i. But the issue of reasonable suspicion was not before the court of appeals. Nor did Alford have a reasonable suspicion, or any suspicion. Although he was present for law enforcement purposes, as part of an ongoing law enforcement investigation of S.G.'s father, Alford himself lacked personal knowledge of the facts of the investigation. *See* Camreta Brief 3; Alfred Brief 8. To compensate for that lack of knowledge, Alford claims that Camreta, rather than Alford, had a reasonable suspicion regarding S.G. (*id.* at 7). Camreta, however, does not claim to have had a reasonable suspicion. Instead, he claims that he did not need any degree of suspicion, and that "speculation and hearsay" were adequate constitutional bases for his custodial interrogation of S.G. *See id.* at 27. That issue was likewise not before the court of appeals.

A. Petitioners Seized S.G. Under the Fourth Amendment

Petitioners have conceded that they seized S.G. under the Fourth Amendment, as they must. Camreta Brief 21; Alford Brief 39. "The test for telling when a

seizure occurs is whether, in view of all circumstances surrounding the incident, a reasonable person would have believed he was not free to leave." *Brendlin v. California*, 551 U.S. 249, 255 (2007). If the person is a child, the test is whether a "reasonable child would have believed that he was free to leave." *Doe v. Heck*, 327 F.3d 492, 510 (7th Cir. 2003). There is no dispute here that a reasonable child would not have felt free to leave the room under the circumstances confronting S.G., as Alford acknowledged in his deposition. (J.A. 40)

B. The History of the Fourth Amendment Establishes That Petitioners' Seizure of S.G. Was Unreasonable

This Court has repeatedly held that, in determining whether a particular seizure is unreasonable under the Fourth Amendment, the Court is "guided by the meaning ascribed to it by the Framers of the Amendment." *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). That inquiry looks to both "the statutes and common law of the founding era. . . ." *Virginia v. Moore*, 553 U.S. 164, 168 (2008). An examination of the history shows that petitioners' seizure of S.G. would have been unlawful in 1789, when the Fourth Amendment was enacted by Congress. Accordingly, this Court should rule that the seizure was unconstitutional.

The power to compel a witness to give testimony has existed since at least 1555, when an English

statute authorized magistrates to demand recognizances from material witnesses "to ensure their appearance at trial," but, "[i]t did not expressly give him the power to jail witnesses pending trial." Ramsey, "In the Sweat Box: A Historical Perspective on the Detention of Material Witnesses," 6 OHIO STATE J. CRIM. L. 680, 690-91 (2009). Subsequent English statutes broadened the power to compel the attendance of witnesses by subpoena. Studnicki, "Material Witness Detention: Justice Served or Denied?" 40 WAYNE L. REV. 1533, 1534-36 (1994). The punishment for failing to comply with a subpoena was still a fine. *See* 3 W. Blackstone Commentaries 369 (1765) ("it must first be remembered, that there is a process to bring [witnesses] in by writ of subpoena ad testificandum: which commands them, laying aside all pretences and excuses, to appear at the trial on pain of 100£ to be forfeited to the king, to which the statute 5 Eliz. c. 9. has added a penalty of 10£ to the party aggrieved, and damages equivalent to the loss sustained by want of his evidence. . . .")

In the United States, the Judiciary Act of 1789 required witnesses to appear and testify in civil cases, and gave magistrates the power to require recognizances of material witnesses in criminal cases, "on pain of imprisonment." Act of September 24, 1789, ch. 20, §§30, 33, 1 Stat. 23, 88-91. Thus, by 1789, it was clear both that witnesses could be detained to give testimony if they refused to give a recognizance and that the determination to detain a witness had to be made by a magistrate.

Thus, at the time of the passage of the Fourth Amendment, the law provided exactly what the court of appeals required here. Under non-exigent circumstances, in order to seize S.G., petitioners were required to obtain a warrant or court order, absent consent. Police action alone, without judicial approval, was illegal. Thus, based upon history alone, the court of appeals should be affirmed.

Petitioner Camreta's claim that "[i]n the late 1700s, states had neither compulsory education nor governmental child-protection organizations" (Camreta Brief 22), omits or misstates important information about education at the time of the Founding. At that time, most states had public schools, though not every child attended them, and some had compulsory education laws. *Ingraham v. Wright*, 430 U.S. 651, 661 n.14 (1977). By 1800, seven of the 16 states explicitly provided for at least some public education in their state constitutions. Cubberly, *Public Education in the United States* 61-62 (1919). Moreover, even where there were no compulsory school attendance statutes, the common law nonetheless obligated parents to educate their children, which was the "greatest of any" parental duty. 1 W. Blackstone Commentaries 438 (1765).

At the same time, the concept of "child protection" was unknown at common law, because parents had complete control over the upbringing of their children, who were considered the property of the parents. Indeed, the notion of "protecting" children from their parents' child-rearing decisions was so

unthinkable that the first child-protectors, in 1874, had to employ animal-protection statutes. *See Nicholson v. Williams*, 203 F.Supp.2d 153, 195 (E.D.N.Y. 2002).

The significant parental obligation to educate their children coupled with the absence of legal regulation of child abuse demonstrates that at the time of our Nation's founding, parental control of their children extended to circumstances similar to this case. Parental consent for a custodial interrogation of this kind would have been essential, in the absence of the kind of warrant or court order required to compel any witness. In other words, the legal structures and assumptions at the Founding would have made petitioners' actions unthinkable. The Framers would never have countenanced what petitioners did to S.G.

C. The Traditional Fourth Amendment Requirements of a Warrant and Probable Cause Apply to Petitioners' Seizure of S.G.

The Fourth Amendment prohibits "unreasonable searches and seizures" and requires "probable cause" for the issuance of warrants. U.S. CONST. AMEND. IV. This Court has interpreted those two clauses together. "[T]he Framers of the Amendment . . . decided that a seizure is reasonable only if supported by a judicial warrant based on probable cause." *United States v. Place*, 462 U.S. 696, 722 (1983) (Blackmun, J., concurring). Neither the limited exceptions to this

principle recognized by this Court nor the policy arguments proffered by petitioners and their amici compel a departure from the Framers' wisdom here. The court of appeals correctly ruled that the warrant and probable cause requirements apply to petitioners' seizure of S.G.[22]

1. The Warrant Requirement Applies Here

As this Court explained more than half a century ago, "[t]he point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 13 (1948). This case is a prime example of why such neutral review is so important. In his Questions Presented to this Court, Camreta claims that "[t]he State received a report that a nine-year old child was being abused by

---

[22] The court of appeals also discussed court orders, but "follow[ed] the lead of [its] sister circuits [to] hold that in the context of the seizure of a child pursuant to a child abuse investigation, a court order permitting the seizure of the child is the equivalent of a warrant." 588 F.3d at 1030. Respondent therefore does not distinguish between warrants and court orders.

her father at home." Camreta Brief i. This is untrue. The State received a report that S.G.'s parents had made statements to Franklin and Melissa Smith, that, if true, suggested that S.G. *might* be being abused by her father. In other words, even if it were true that S.G.'s parents had said what the Smiths claimed, and even if the statements S.G.'s parents allegedly made were themselves true – evidentiary questions that petitioners ignored then and ignore now – there was *still* no report that she "was being abused." Being required to present this limited information, which Camreta concedes amounted to no more than "speculation and hearsay" (Camreta Brief 11, 27), to a neutral magistrate might well have encouraged petitioners to investigate before interrogating a nine-year-old girl.

Indeed, contrary to petitioners' and the United States' suggestion that the horrors of child abuse make the warrant requirement inappropriate, the opposite is true. Allegations of child abuse are particularly likely to lead well-intentioned officials to skip basic investigatory steps because of the strong emotional response that such allegations engender.[23] The temptation toward overzealousness in the

---

[23] The tragic history of false "allegations of outrageously bizarre and often ritualistic child abuse [that] spread like wildfire across the country. . . ." in the 1980s, *Friedman v. Rehal*, 618 F.3d 142, 155 (2d Cir. 2010), is a cautionary tale. *See* II.E., *infra*, for a discussion of the type of highly improper questioning of purported child victims in such cases and the terrible consequences of such shoddy investigations.

investigation of child abuse, coupled with the concrete and irreversible harm that poorly-conducted investigations can cause – such as the harm inflicted on S.G. and her family – counsel in favor of careful and deliberate action. Yet the authority that petitioners claim for making warrantless seizures of young children "devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field," precisely what the Fourth Amendment is designed to prevent. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323 (1978) ("a warrant . . . would provide assurances from a neutral officer that the [seizure] is reasonable under the Constitution. . . .")[24]

That child abuse can be a difficult crime to investigate does not change the Fourth Amendment's requirements. Many terrible crimes – such as, for example, murder, gang-related violence, and elder abuse – may be difficult to investigate. But the Constitution does not make exceptions to the Fourth Amendment because a particular type of case will be difficult to investigate. As this Court has explained,

---

[24] These concerns are particularly salient in the context of child abuse and neglect for an additional reason. Unlike the police, child welfare investigators do not have the discretion to decide which allegations to investigate and which to ignore. By law, they must investigate all reports of abuse. 45 C.F.R. §1340.14(d); Or. Rev. Stat. §419B.020(1)(a). *See also* Or. Rev. Stat. §419B.005(1)(a)(G) (defining abuse to include "subjecting a child to a substantial risk of harm to the child's health or welfare"). *See* II.E., *infra*, for a more extended discussion of these concerns.

> the State points to the vital public interest in the prompt investigation of the extremely serious crime of murder. No one can doubt the importance of this goal. But the public interest in the investigation of other serious crimes is comparable. If the warrantless search of a homicide scene is reasonable, why not the warrantless search of the scene of a rape, a robbery, or a burglary? 'No consideration relevant to the Fourth Amendment suggests any point of rational limitation' of such a doctrine.

Mincey v. Arizona, 437 U.S. 385, 393 (1978), *quoting Chimel v. California*, 395 U.S. 752, 766 (1969). The Fourth Amendment may sometimes make government officials' jobs more difficult. That is the price of the liberty from potentially abusive government practices that the Framers wished to guarantee.

Moreover, petitioners have presented no evidence that requiring a warrant in non-exigent situations will *in fact* make investigating child abuse more difficult, much less that it would have done so in this case, where four days elapsed after Camreta learned of the allegations before he took any action at all. Petitioners have provided "a dearth of horribles demanding redress." *Atwater v. City of Lago Vista*, 532 U.S. 318, 353 (2001). On the contrary, for more than a decade, the Second Circuit has required court orders or exigent circumstances for the removal of children from their parents' custody. *See Tenenbaum v. Williams*, 193 F.3d 581, 604 (2d Cir. 1999). Yet the states containing 97.4% of the Second Circuit's

population, New York and Connecticut, did not sign the Brief of the States of Arizona, *et al.*, in favor of petitioners.

Petitioners and the United States cannot support their claim that custodial police/CPS interrogations of schoolchildren are necessary to obtain information from children and hence protect them from abuse; they cite no evidence that such a widespread "practice" even exists.[25] To the contrary, the "practice" is highly unusual and is contrary to numerous professional standards and protocols for interviewing suspected victims of child abuse, including the Guidelines subsequently adopted by the State of Oregon itself. Oregon Interviewing Guidelines (2d ed. 2004), available at http://www.doj.state.or.us/crimev/pdf/orinterviewingguide.pdf ("Guidelines").

Petitioner Alford complains that the court of appeals' ruling would prohibit a police officer from asking a child whether she is safe "at that very moment." Alford Brief 4 n.1. There are, of course, circumstances in which police "conduct – necessarily swift action predicated upon the on-the-spot

---

[25] Petitioners and their amici have together provided this Court with only two concrete examples of nonconsensual police/CPS interrogations of schoolchildren: S.G. and *People v. Assad*, 189 Cal. App. 4th 187 (3d Dist. 2010). *See* Brief of the California State Association of Counties 28-32. In both cases, the interrogations yielded false results: S.G., after two hours, agreed, falsely, that her father had abused her; Assad's son falsely told the police-caseworker team that his father had *not* abused him.

observations of the officer on the beat – . . . historically has not been, and as a practical matter could not be, subjected to the warrant procedure." *Terry v. Ohio*, 392 U.S. 1, 20 (1968). But the court of appeals did not address such situations because this case does not present such a circumstance. Petitioners had days to seek a warrant.

The United States claims that because S.G. did not face "incarceration or other punishment" (U.S. Brief 26), petitioners did not need a warrant in order to seize her. The United States cites no authority for this contention, which cannot be squared with this Court's teaching that it is "anomalous to say that the individual . . . [is] fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Soldal v. Cook County, Illinois*, 506 U.S. 56, 69 (1992). *See also Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982) ("If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed – who may not be punished at all – in unsafe conditions"). Indeed, in the few reported cases in which police have seized and detained witnesses without judicial approval, courts have found constitutional violations. *See, e.g., Manzanares v. Higdon*, 575 F.3d 1135 (10th Cir. 2009) (three-hour detention of witness in his home and in a police car, while police searched for the perpetrator of a crime held unconstitutional); *Walker v. City of Orem*, 451 F.3d 1139 (10th Cir. 2006) (90-minute detention of witnesses to a police shooting held

unconstitutional); *Perkins v. Click*, 148 F.Supp.2d 1177, 1182 (D.N.M. 2001) ("blanket power to arrest any witness to a major crime, and hold them until they are interviewed at police convenience, cannot be constitutionally sustained"); *Stone v. Holzberger*, 807 F.Supp. 1325, 1338 (S.D. Ohio 1992) ("no reasonable law enforcement officer could believe that a criminal arrestee is entitled to higher constitutional protections than a material witness arrestee who has committed no crime"). Nor does *Illinois v. Lidster*, 540 U.S. 419 (2004), hold otherwise. (*See infra*, discussing *Lidster* at length.)

2. Probable Cause Is the Appropriate Standard for Evaluating the Seizure of S.G.

"The long-prevailing standard of probable cause protects 'citizens from rash and unreasonable interferences with privacy . . . ' while giving 'fair leeway for enforcing the law in the community's protection.'" *Maryland v. Pringle*, 540 U.S. 366, 370 (2003), *quoting Brinegar v. United States*, 338 U.S. 160, 176 (1949). Despite this longstanding principle, petitioner Alford and the United States argue not only that government officials should be able to seize suspected victims of child abuse for questioning without a warrant or consent, but also that they should be able to do so on the basis of either reasonable suspicion of abuse (Alford Brief 32, 35) or a vague "reasonableness" standard. U.S. Brief 27. Camreta goes even further, arguing that such actions are justified on the

basis of no more than "speculation and hearsay." Camreta Brief 11, 27. Nothing in this Court's jurisprudence justifies such a dramatic reduction in the protections the Fourth Amendment confers upon our Nation's people.

To the contrary, when individuals have been seized for interrogation, this Court has repeatedly reaffirmed the probable cause requirement. In *Dunaway v. New York*, for example, this Court made clear that the "detention for custodial interrogation – regardless of its label – intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." 442 U.S. 200, 216 (1979). *See also id.* at 214-15 ("[T]he Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions'"). Nor is *Dunaway* unique. *See, e.g., Kaupp v. Texas*, 538 U.S. 626, 630 (2003) (police act of waking individual at 3 a.m., telling him "We need to go and talk," and transporting him to police station, constituted a seizure requiring probable cause); *Hayes v. Florida*, 470 U.S. 811, 816 (1985) (police seizures of individuals and transportation to station house for questioning "for investigative purposes . . . are sufficiently like arrests to invoke the traditional rule . . . [of] probable cause"); *Florida v. Royer*, 460 U.S. 491 (1983); *Brown v. Illinois*, 422 U.S. 590, 605 (1975) (seizure without probable cause for investigation "in the hope that something might turn up" held improper); *Davis v.*

Mississippi, 394 U.S. 721, 726 (1969) ("to argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment"). The Court should decline petitioners' and the United States' invitation to overrule this long line of precedent, and, as with the warrant requirement, should decline to provide lesser constitutional protection to S.G., who was suspected of no wrongdoing, than to the individuals seized in those cases, who were. *See Soldal*, 506 U.S. at 69 ("anomalous" for innocent individual to have fewer rights than the accused).

The United States asserts that probable cause is "not necessarily required" for "seizures less intrusive than an arrest – a category that includes most seizures related to official questioning" (U.S. Brief 21, 26), but the cases which the United States cites do not support that broad proposition. In *Brown v. Texas*, 443 U.S. 47 (1979) (U.S. Brief 22), this Court invalidated a stop and subsequent arrest, when police had neither probable cause nor reasonable suspicion to conclude that Brown was engaging, or about to engage, in criminal activity. Rather than create a new exception to the probable cause requirement, *Brown* upheld existing precedents. In *United States v. Sharpe*, 470 U.S. 675, 688 (1985) (U.S. Brief 23), this Court upheld a 20-minute *Terry* stop of a vehicle, where "the police have acted diligently and a suspect's actions contribute to the added delay about which he complains." In *Michigan v. Summers*, 452 U.S. 692, 705 (1981), this Court held that "a warrant

to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." Thus, the police had the right, under the Fourth Amendment, to detain Summers when they found him leaving his home just as they were arriving to execute the search warrant. Here, petitioners had no warrant, and S.G. had no contraband. Both *United States v. Montoya de Hernandez*, 473 U.S. 531, 540 (1985), and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (U.S. Brief 23), concern border searches and seizures, where the Fourth Amendment balance between the interests of the Government and the privacy right of the individual is "struck much more favorably to the Government" and the individual's "expectation of privacy is less. . . ." *Montoya de Hernandez*, at 539. Finally, in *United States v. Hensley*, 469 U.S. 221 (1985) (U.S. Brief 23), this Court ruled that the *Terry* standard applied to individuals whom the police reasonably suspected of having already committed a felony, as well as those who were about to commit one. Thus, none of the cases cited by the United States undermine the probable cause requirement for a seizure of an individual for the purpose of a protracted interrogation.

To the contrary, this Court has created exceptions to the probable cause requirement only for seizures that are brief stops, lasting at most a few minutes. *See, e.g., Terry v. Ohio*, 392 U.S. 1 (1968) ("reasonable suspicion" standard for brief stops of individuals and

searches for weapons); *Lidster*, 540 U.S. 419 (2004) (balancing test to evaluate brief stops of possible eyewitnesses to hit-and-run accident). Those exceptions, however, do not apply to evaluations of "the constitutional propriety of an investigative 'seizure' upon less than probable cause for purposes of 'detention' and/or interrogation." *Terry*, 392 U.S. at 20 n.16. Here, petitioners knew before the seizure began that they intended to interrogate S.G. at length. They were not responding to their observations of suspicious behavior on the street, as in *Terry*, and they did not face the prospect of being unable to investigate at all if they could not seek the assistance of potential witnesses to a hit-and-run accident, as in *Lidster*. The justifications for a standard other than probable cause that the Court accepted in those cases do not apply to the premeditated custodial interrogation of S.G. at issue here.[26]

As with the warrant requirement, "there may be circumstances in which the law of warrant and probable cause established in the criminal setting does not work effectively in the child removal . . . context." *Tenenbaum*, 193 F.3d at 604. But, as in *Tenenbaum*, "[t]his is not such a case."[27] *Id.* Moreover, despite their

---

[26] Probable cause is the appropriate standard for other reasons as well. A proliferation of standards for different types of seizures can sow confusion. *Dunaway*, 442 U.S. at 213-14.

[27] As the United States correctly notes, not all police questioning of individuals are seizures. U.S. Brief 21. However, here, petitioners have conceded that they seized S.G., and there can be no dispute that they did. In contrast to the United States'

(Continued on following page)

alarmist rhetoric about how difficult it may be to establish probable cause in the context of child abuse, particularly sexual abuse, petitioners and the United States offer nothing more than speculation on this point. There are no barriers to the investigators seeking information from a child's teachers, from neighbors, from other family members, and from whomever made the original report. In fact, such interviews are a routine and mandatory part of child abuse investigation. 45 C.F.R. §1340.14(d). In fact, as discussed *infra*, parental consent is the rule, not the exception.

Nonetheless, petitioners and the United States raise the frightening, albeit rare, specter of the child about whom the government has reasonable suspicion of abuse but is unable to obtain either probable cause or parental consent. But that rare circumstance cannot define the constitutional limitations of government action with respect to *all* allegations of abuse or neglect made to state child abuse authorities, particularly when more than three quarters of those allegations turn out to be supported by no evidence whatsoever. *See Greene*, 588 F.3d at 1017. As this Court held in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), even the ability to reliably identify pregnant women who were taking illegal drugs,

---

hypothetical fact patterns (U.S. Brief 22 n.3), S.G. was not "asked to come to the interview voluntarily," and it is undisputed that she justifiably did not "feel free to terminate" it. (*See* J.A. 39-40)

which are highly likely to cause serious health problems for their babies, did not justify a relatively non-intrusive urine test. The harms to innocent families here from overzealous abuse investigations counsel even more strongly against a reduction in the Fourth Amendment's requirements.[28]

3. *Illinois v. Lidster* Does Not Apply to the Seizure of S.G.

Petitioners and the United States dramatically overread *Lidster* when they argue that it abandons the warrant and probable cause requirements whenever law enforcement officials detain *witnesses* rather than suspects. *See* Alford Brief 15, 23-24; Camreta Brief 10, 20, 37; U.S. Brief 26. Even a cursory review of *Lidster* demonstrates that this reading is inaccurate.

---

[28] Alford's suggestion that a police officer should be able to escort a child to a "safe place" for questioning, based on no more than reasonable suspicion (Alford Brief 52), exemplifies the risks of reducing those requirements. Virtually every parent has had the mortifying experience of their child publicly throwing a tantrum, loudly crying or screaming, or simply going limp in a precocious exercise of civil disobedience that requires the parent to carry or drag her. Alford effectively claims the right to separate the child from the parent in such a situation on the basis of a police officer's disapproval of the parent's efforts to handle the situation, which might arguably be reasonable suspicion of abuse. That possibility should alarm any parent – and is particularly terrifying for parents whose children have developmental delays or behavioral or neurological disorders.

In *Lidster*, the police set up a traffic stop in the hopes of locating witnesses to a fatal hit-and-run accident that occurred about one week earlier at that location. The Court described the circumstances of the traffic stop in detail:

> Police cars with flashing lights partially blocked the eastbound lanes of the highway. The blockage forced traffic to slow down, leading to lines of up to 15 cars in each lane. As each vehicle drew up to the checkpoint, an officer would stop it for 10 to 15 seconds, ask the occupants whether they had seen anything happen there the previous weekend, and hand each driver a flyer, [asking for assistance in identifying the vehicle and driver from the accident].

540 U.S. at 422. Those factual circumstances were critical to the Court's decision to apply a reasonableness analysis rather than impose a "presumptive rule of unconstitutionality." *Id.* at 427. A comparison of those circumstances to the facts of petitioners' seizure of S.G. demonstrates that petitioners' and the United States' reading of *Lidster* is remarkably wide of the mark.

First, in ruling that something less than traditional Fourth Amendment requirements applied, the *Lidster* court emphasized that the police activity was essentially the equivalent of "approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions. . . ." *Id.* at 425 (internal quotation marks and citations omitted).

S.G., in contrast, was brought to a secluded room, where she was confined with a police officer and another government official. No one ever asked her if she was willing to answer questions or gave her the option of saying no.

Second, *Lidster* expressly relied on the brevity of the stops in question – all of 10 to 15 seconds, *id.* at 422, 425, and noted that "[a]ny accompanying traffic delay should prove no more onerous than many that typically accompany normal traffic congestion." *Id.* at 426. Nor is *Lidster* the only case to consider the importance of the length of a detention. *See, e.g., United States v. Place*, 462 U.S. 696, 709 (1983) (the Court has "never approved a seizure of the person for the prolonged 90-minute period involved here and cannot do so on the facts presented by this case"). S.G. was held for two hours. And being removed from her classroom for a two-hour interrogation by two men she had never seen before is not the sort of experience that "typically accompan[ies]" fourth grade.

Third, *Lidster* reasoned that brief "information-seeking highway stops are less likely to provoke anxiety or to prove intrusive." *Id.* at 424. Spending two hours repeatedly asking a nine-year-old girl whether her father touches her in a "bad" way, continuing even after she denies it, is quite "likely to

provoke anxiety and to prove intrusive," as indeed it did for S.G.[29]

Fourth, *Lidster* involved cars, and as the Court noted, "[t]he Fourth Amendment does not treat a motorist's car as his castle." *Id.* at 424. "[A]utomobiles occupy a special category in Fourth Amendment case law . . . due, among other factors, to the quick mobility of a car, the registration requirements of both the car and the driver, and the more available opportunity for plain-view observations of a car's contents." *Marshall*, 436 U.S. at 315 n.10. With a car, "the opportunity to search is fleeting since a car is readily movable." *Chambers v. Maroney*, 399 U.S. 42, 51 (1970). None of these factors apply here. Petitioners knew that they could find S.G. at her home outside of school hours, as indeed they did, or where she would be during school hours, if they obtained a court order or a warrant.

It is true, of course, that in addition to the factors just discussed, when the *Lidster* court held that something less than traditional Fourth Amendment requirements should apply, it also relied on the fact that the police were looking for witnesses, not suspects. 540 U.S. at 423. But petitioners and the United States mention *only that factor* when arguing that this Court should apply a balancing test to determine

---

[29] Alford's contention that this "Court has never held that the act of posing questions to individuals, by itself, intensifies the intrusiveness of the seizure" (Alford Brief 55), simply cannot withstand even a cursory reading of *Lidster*.

the constitutionality of petitioners' actions. *Lidster* emphatically did not rely on that factor alone; before concluding that it could apply the balancing test, the Court evaluated a host of aspects of the traffic stop at issue. Petitioners and the United States thus misstate the holding of *Lidster* and misrepresent its analysis.

4. Family Privacy Concerns of Constitutional Significance Counsel in Favor of the Warrant and Probable Cause Requirements

Beyond all of the traditional Fourth Amendment considerations already discussed, this case involves additional interests of constitutional significance. The "interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). The constitutional rights of parents include not only the right to custody of their children, but the right of control over their children. Thus, a parent has the right to decide whether to educate her child in a public school or a private school, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); to make decisions about her child's medical treatment, *Parham v. J.R.*, 442 U.S. 584 (1979); and to determine which adults her child will associate with. *Troxel*, 530 U.S. at 57. The parent's right to decide whether her child will be subjected to a protracted custodial interrogation, in the absence of a warrant and probable cause or exigent circumstances,

falls within that spectrum, especially where, as here, the subject of the interrogation itself intruded on family privacy.

Here, petitioners summarily dismiss Sarah Greene's right to decide whether her young daughter would be subjected to such an interrogation, claiming that "seeking parental consent is simply not a safe or viable option when the suspected abuser is a parent." Camreta Brief 27. *See also* Alford Brief 41 ("[w]here a parent may be the abuser, seeking consent from either parent could be detrimental to the child. Either parent could intentionally or unintentionally influence the child. . . ."). [9] U.S. Brief 30. But this Court has rejected that type of speculation: "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." *Parham*, 442 U.S. at 603. *See also id.*, at 602 ("[H]istorically, [the law] has recognized that natural bonds of affection lead parents

---

[9] Petitioners' contention that parents (including non-accused parents) will not consent to interviews of their children in child abuse investigations, when those interviews are conducted in non threatening, age appropriate ways in appropriate locations, is reminiscent of similar complaints by police officials decades ago that, if they were required to give warnings to arrestees, no one would ever confess to a crime. *See, Miranda v. Arizona*, 384 U.S. 436 (1966). That dire prediction has proven untrue. After being given *Miranda* warnings, "lots of defendants go ahead and confess . . ." *Brown v. Texas*, 443 U.S. 47, 54 (1979).

to act in the best interest of their children."), citing 1 W. Blackstone Commentaries 447 (1765). Nor should this Court discard its many decisions affirming the constitutional primacy of parental decision-making because some parents may make bad decisions. "The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." *Parham*, 442 U.S. at 603 (emphasis in original). In the absence of a showing that a parent is unfit, her fitness should be presumed and her parental rights should be respected.

Moreover, petitioners and the United States are wrong on the facts with respect to both this case in particular and the broader experience in the child welfare field. Petitioners ignore the factual record here when they suggest that Sarah Greene would either not have given her consent to interview S.G. or that she would have tried to protect her husband (the alleged abuser) by "influencing" (Alford Brief 41) S.G. to lie. Sarah Greene (and her husband) not only consented to petitioners' entry into their home on February 24, 2003, and voluntarily participated in an interview with them (J.A. 65) but Sarah also agreed to produce her daughters to be interviewed in a professional, age-appropriate manner at the KIDS

Center – even before she knew that petitioners had already interrogated S.G. (J.A. 49-50)[21]

As a statistical matter, the overwhelming majority of parents – more than 90 percent – consent to the interviews between child welfare investigators and their children. Coleman, "Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment," 47 WM. & MARY L. REV. 413, 430 (2005). Petitioners and their amici have not provided any evidence whatsoever to the contrary. Specifically, they have not "brought to this Court's attention any widespread pattern of refusal." *Marshall*, 436 U.S. at 316. Absent such evidence, this Court may properly assume that the "great majority" of parents "can be expected in normal course to consent. . . ." *Id.*

Congress itself has made such a presumption. Federal law encourages "strategies to promote collaboration with the families" who are under investigation. 42 U.S.C. §5106a(a)(6)(A). In fact, the United States' proposal that officials investigating child abuse not even tell the children's parents about the existence of the investigation, much less ask for their consent (U.S. Brief 30), is contrary to federal law, which requires that states notify parents about the

---

[21] Sarah Greene would never have consented to the coercive, age-inappropriate, custodial police interrogation to which petitioners subjected S.G.

existence of a child protective investigation at the initial contact. 42 U.S.C. §5106a(b)(2)(A)(xviii).

In short, the traditional Fourth Amendment protections of a warrant and probable cause have special resonance in this context; they respect and support the constitutionally-protected rights of parents. That the government seeks to intrude on such intimate family relationships argues *for*, not against, requiring some measure of reliable evidence, reviewed by a neutral magistrate.

D. The "Special Needs" Doctrine Does Not Apply Here

This Court has, on occasion, approved of searches and seizures on less than probable cause and without a warrant, based on "special needs, divorced from the state's general interest in law enforcement." *Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001). The special needs doctrine does not apply to the seizure of S.G. because that seizure was performed for law-enforcement-related reasons. In addition, other features of the special needs cases do not apply here: the seizure was in no way consensual, and petitioners' conduct undermined, rather than supported, the particular school-based rationales for the doctrine.

1. The Substantial Law Enforcement Involvement in the Seizure of S.G. Renders the "Special Needs" Doctrine Inapplicable

The "special needs" doctrine, by its own terms, has been used to uphold only those searches which are "performed for reasons unrelated to law enforcement." *Ferguson,* at 81 n.5. Entanglement with law enforcement thus makes the special needs doctrine inapplicable. Law enforcement was intimately involved in every aspect of the seizure of S.G., with Alford present, in uniform and armed, for law enforcement purposes. (J.A. 37-38) Where a "child abuse investigation cannot be sufficiently disentangled from general law enforcement purposes, . . . the 'special needs' analysis is simply inapplicable and traditional Fourth Amendment limits would apply." 5 W. LaFave, *Search and Seizure* §10.3(a), p. 106 (4th ed. 2004).

In *Ferguson,* in holding a program for drug-testing pregnant women unconstitutional, this Court focused on its law enforcement component: "the purpose actually served by the MUSC searches 'is ultimately indistinguishable from the general interest in crime control.'" 532 U.S. at 81, *quoting Indianapolis v. Edmond,* 531 U.S. 32, 44 (2000). The Court further noted that "[i]n none of our previous special needs cases have we upheld the collection of evidence for criminal law enforcement purposes. Our essential point is . . . the extensive entanglement of law enforcement cannot be justified by reference to legitimate needs." *Ferguson,* 532 U.S. at 84 n.20.

Here as well, law enforcement was extensively entangled. First, petitioner Alford, a deputy sheriff who was armed and in uniform, conducted the seizure of S.G., along with Camreta. Alford acknowledged that he was present for law enforcement purposes. (J.A. 37-38) Contrary to petitioners' arguments that S.G. was seized solely for child welfare purposes (Alford Brief 30-31; Camreta Brief 36-38), Alford's participation converted the seizure of S.G. into a law enforcement matter. Moreover, S.G.'s interrogation was one part of a larger police investigation of S.G.'s father based on accusations made against him by another family. The child welfare component of the investigation began later.

The nature of the interrogation of S.G. also showed that the law enforcement component was pervasive. That relentless interrogation – using leading questions, repeating those leading questions when the child gave negative answers, telling the child "No, that's not right," when the child gave answers that contradicted the interrogators' preconceived notions of the facts, detaining the child for a lengthy time period – was contrary to well-known effective questioning techniques for child welfare investigations (*see* II.E.3, *infra*), though not uncommon in police interrogations of criminal suspects. Finally, the State used the misinformation that petitioners obtained from S.G. to arrest and prosecute her father, including having Camreta testify before the grand jury (Doc. #44, Exh. 4), in order to secure an indictment.

Petitioner Camreta claims that he was acting for child welfare purposes, to protect S.G. (Camreta Brief 3, 28), and that his "motive was benign rather than punitive," *Ferguson*, 532 U.S. at 85. But Camreta did not seek to remove S.G. and her sister from their home until after their father had been indicted, arrested, and ensconced in jail, at which point he would have been completely unable to abuse his daughters. Thus, here, as in *Ferguson*, the seizure and interrogation of S.G. had "a penal character with a far greater connection to law enforcement than other searches sustained under [this Court's] special needs rationale." 532 U.S. at 89 (Kennedy, J., concurring).

The drug-testing program in *Ferguson* also had a "benign purpose" analogous to one of the purposes in this case – to prevent parents from inflicting harm on their children. Even such a laudable goal did not rescue the program in *Ferguson*, where law enforcement was "as a systemic matter, . . . a part of the implementation." *Id.* at 88 (Kennedy, J., concurring in the judgment) (noting the importance of the state's interest in the health of mothers and children but finding the drug tests unconstitutional). *Ferguson* therefore applied traditional Fourth Amendment jurisprudence to a situation in which, as in this case, the criminal justice system was entwined with a policy having an ostensibly benevolent, non-criminal purpose. In contrast, when this Court has upheld drug testing pursuant to the special needs doctrine, the results of those tests were not provided to law enforcement. *See, e.g., Skinner v. Railway*

Labor Executives' Association, 489 U.S. 602, 621 n.5 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 663 (1989); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 658 (1995); *Board of Education of Independent School District No. 92 of Pottawattamie County v. Earls*, 536 U.S. 822, 833 (2002).

Camreta attempts to avoid this body of law by claiming that entanglement with law enforcement is irrelevant to the special needs doctrine where "the potential for self-incrimination is minimal or unlikely." Camreta Brief 37. Camreta cites no authority for this proposition, because there is none. Instead, Camreta relies, again, on *Lidster*. But as respondent has already established, *Lidster's* holding that the traditional Fourth Amendment requirements did not apply rested on far more than that the police in that case sought witnesses, not suspects. This Court should reject Camreta's attempt to bootstrap onto *Lidster*'s inapposite language the irrelevance of individualized suspicion to an "information-seeking stop," because its approval of the stop in *Lidster* was grounded on a multiplicity of factors; that the police there were seeking only "information" was just one.

2. The Lack of Implicit Consent to the Seizure of S.G. Rendered the "Special Needs" Doctrine Inapplicable

A second "essential, distinguishing feature of the special needs cases is that the person searched has

consented. . . ." *Ferguson*, 532 U.S. 67 at 90 (Kennedy, J., concurring). Specifically, in those cases the individual could avoid the search by choosing to avoid the activity which entailed the search. *See Earls*, 536 U.S. at 841 (Breyer, J., concurring) (avoid drug testing by not participating in extracurricular activities); *Acton*, 515 U.S. at 657 (eschew participation in interscholastic sports); *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) (avoid jobs that require drug testing); *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989) (same); *Wyman v. James*, 400 U.S. 309 (1971) (forego government cash benefits). In this case, S.G. and Sarah Greene had no such option. The seizure was, in short, completely non consensual.[32]

Petitioners imply that merely by sending her daughter to a public school Sarah Greene consented to a broad waiver of her daughter's constitutional rights. Alford Brief, 50-53; Camreta Brief 30-33. This

---

[32] The cases approving searches of the homes of probationers and parolees, although sometimes included in the special needs category, also do not support petitioners' actions here. *See, Griffin v. Wisconsin*, 483 U.S. 868 (1987); *United States v. Knights*, 534 U.S. 112 (2001); *Samson v. California*, 547 U.S. 843 (2006). Probationers and parolees "and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration." *Ingraham v. Wright*, 430 U.S. 651, 669 (1977). "Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." *Knights*, 534 U.S. at 119.

Court has held to the contrary. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (First Amendment rights); *Ingraham v. Wright*, 430 U.S. 651 (1977) (Fourteenth Amendment right to be free of infliction of severe physical injury). This Court has never held that a school building is a rights-free zone in which law-enforcement officials who are not connected with the school can enter and take whatever actions they choose, free of constitutional constraints, and nothing in the case law suggests that such shockingly broad parental consent can be presumed. (*See* II.E.2, *infra*, for a further discussion of the rights retained by schoolchildren.)

3. The Rationales for the "Special Needs" Doctrine in the School Context Are Inapplicable Here

Petitioners and the United States entirely ignore the central rationales for the special needs doctrine in the schools context when they argue that S.G.'s presence in a public school eliminated her Fourth Amendment rights to be free of a seizure by non-school government officials. As this Court has emphasized, in order to provide education to schoolchildren, education officials must "maintain an environment in which learning can take place." *T.L.O.*, 469 U.S. at 343. To provide that environment, therefore, "school officials retain broad authority to protect students and preserve 'order and a proper educational environment,'" *Safford Unified School Dist. No. 1 v.*

Redding, 129 S. Ct. 2633, 2647 (2009), which "sometimes requires that students be subjected to greater controls than those appropriate for adults." *Earls*, 536 U.S. at 831.

In this case, however, the seizure of S.G. had nothing whatsoever to do with her education or discipline, or with any other student's, for that matter. Indeed, in both their conduct with S.G. and their arguments to this Court, the school setting is relevant to petitioners only as a convenience. Rather than advancing the school's goals of maintaining order, promoting education, and protecting the students, petitioners undermined those goals when they appeared at S.G.'s school and seized her. Petitioners, two non-educators, disrupted the normal educational activity by removing S.G. from her classroom for two hours.[23] The Fourth Amendment's education jurisprudence does not, and should not, protect non-educators who come into schools for law-enforcement, non-educational purposes. (J.A. 37-38) Indeed, this Court has expressly declined to find that such behavior is governed by its school jurisprudence: "[t]his case does not present the question of the appropriate standard for assessing the legality of searches conducted by

---

[23] Petitioners' actions were thus the antithesis of the examples upon which they rely – in which public officials address students and health practitioners conduct routine vision and hearing screening, generally at the invitation of school officials or in order to ensure that students' physiological barriers to learning are addressed. Camreta Brief 31-32.

school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question."[34] *T.L.O.*, at 342 n.7.

Moreover, petitioners undermined the school's responsibility for protecting its students' safety when they excluded school staff from the interrogation. Normally, when a child is at school, she is "rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment." *Ingraham v. Wright*, 430 U.S. 651, 670 (1977). By excluding school staff from their custodial interrogation of S.G., petitioners ensured that no one was present to witness or protest their coercive and abusive interrogation tactics, or the protracted detention itself.[35]

---

[34] The lower federal courts have categorically rejected the notion that *T.L.O.* should apply when police officers and child welfare workers come to a school to investigate possible child abuse which allegedly occurred off of school premises. "Because the case before us does not involve efforts by school administrators to preserve order on school property, it does not implicate the policy concerns addressed in *T.L.O.* and therefore does not merit application of the *T.L.O.* standard." *Jones v. Hunt*, 410 F.3d 1221, 1228 (10th Cir. 2005). A child "unquestionably has a reasonable expectation of privacy in the premises of the [private] school he attends vis-a vis government officials." *Doe v. Heck*, 327 F.3d 492, 512 (7th Cir. 2003).

[35] Alford's claim that petitioners "obtained consent" from the school (Alford Brief, p. 53) to seize and interrogate S.G. for two hours is contrary to fact. Camreta did not ask; he "told schools officials that he and Alford were there to interview S.G." 588 F.3d at 1017.

Finally, when a school official is faced with a student who may be violating school rules by, for example, possessing contraband, questions of warrants and probable cause are impracticable, as the official lacks time to obtain a warrant and expertise for understanding probable cause. *T.L.O.*, 469 U.S. at 353. No such arguments apply to petitioners, who had plenty of time – days – to obtain a warrant, and whose jobs required them to understand probable cause.

E. Even If a Lower Standard Applied Here, the Seizure of S.G. Was Unreasonable and Unconstitutional

Regardless of the doctrinal paths they take to get there, petitioners and the United States all argue that the seizure of S.G. should be evaluated for "reasonableness," using the balancing test most recently articulated in *Lidster*. The *Lidster* court looked to 1) "the gravity of the public concerns served by the seizure," 2) "the degree to which the seizure advances the public interest," and 3) "the severity of the interference with individual liberty." 540 U.S. at 426-27, *quoting Brown v. Texas*, 443 U.S. 47, 51 (1979). Respondent submits that the traditional requirements of probable cause and a warrant apply here. But even were this Court to apply the *Lidster* balancing test, petitioners' conduct would not pass constitutional muster, as their custodial police interrogation of S.G. about whether her father had sexually

abused her was *unreasonable* under this test.[38] Camreta himself, along with the United States, appears to agree, for he *offers no defense whatsoever of his conduct during the seizure*. Nor does the United States. Indeed, Camreta asks this Court *not* to examine the conduct of the very seizure whose constitutionality is the subject of this case, even under the legal standard that he promotes, and the United States offers only a lukewarm suggestion about how this Court might weigh some of the facts should it choose to evaluate the interrogation's reasonableness, without actually defending it. U.S. Brief 31-32.

1. There Are Multiple Public Concerns at Issue

While petitioners contend that there is an "epidemic" of child abuse, and thereby suggest that, for this reason, well established constitutional guarantees should be relaxed, the statistics they rely on do not support their plea. Most child welfare investigations address alleged *neglect*, not abuse. Of the 693,000 children for whom reports of abuse or neglect were "substantiated" in 2009, 78.3% involved neglect,

---

[38] Camreta mischaracterizes the court of appeals' opinion in saying that court found the reasonableness of the seizure to be a "close question." Camreta Brief 39, 40. In fact, the lower court said that the only "close question" was whether petitioners were entitled to qualified immunity. 588 F.3d at 1032.

while only 9.5% involved sexual abuse.[37] Finkelhor, "Updated Trends in Child Maltreatment 2009," Table 3-13, at 46-47, http://www.unh.edu/ccrc/pdf/Updated_Trends_in_Child_Maltreatment_2009.pdf. Child abuse in general has declined, and child sexual abuse has declined even more, a total of 61% from 1990 to 2009. Moreover, in an extraordinary percentage of cases – about 79% in 2008 – an investigation produced no evidence of either abuse or neglect. Alford Brief 29.

Further, not all the remaining 21% of allegations represent actual maltreatment. Rather, those allegations have met whatever standard of evidence investigators use to determine that an allegation is "substantiated" or "indicated," which frequently is less than a preponderance, and which varies from state to state.[38] *See, e.g.*, Or. Rev. Stat. §419B.030(1) ("reasonable cause to believe that a child's condition was the result of abuse"); *Valmonte v. Bane*, 18 F.3d 992, 997 (2d Cir. 1994) ("some credible evidence" in New York). Those initial determinations, which are not made by neutral magistrates, are not conclusive.

[37] Respondent in no way means to minimize the harm that befalls child sexual abuse victims or to suggest that the state interest in protecting those children is insignificant. Respondent offers these statistics only to show that the claim of rampant and epidemic child sexual abuse intimated by petitioners is inaccurate.

[38] Further evidence of the vagueness of the standard is shown by the fact that, in 2008, child protective agencies commenced court proceedings in only 19.7% of the substantiated cases. http://www.acf.hhs.gov/programs/cb/pubs/cm08/table6_8.htm

When parents challenge those determinations at administrative hearings, about 75% are reversed. *Valmonte v. Bane*, 19 F.3d 994, 1003-04 (2d Cir. 1994). Consistent with that experience, allegations that Nimrod Greene abused his own daughters were dismissed by both the juvenile court and by the district attorney.

In addition, as the purpose of the child welfare system is to protect children, there is a public interest in ensuring that the system itself does not create unnecessary trauma. Congress itself has found that, in cases of alleged child abuse, "too often the system does not pay sufficient attention to the needs and welfare of the [alleged] child victim, aggravating the trauma that the child victim has already experienced. . . ." 42 U.S.C. §13001(4). Here, for example, the seizure and subsequent events inflicted significant damage on S.G. and her family, thus entirely failing to protect S.G. from traumatic harm, the precise opposite of the state's interest.

Finally, there is a public interest in protecting families and not breaking them apart unnecessarily. "[S]ociety's interest in the protection of children is . . . multifaceted, composed not only with concerns about the safety and welfare of children from the community's point of view, but also with the child's psychological well-being, autonomy, and relationship to the family or caretaker setting." *Franz v. Lytle*, 997 F.2d 784, 792-93 (10th Cir. 1993); *accord*, *Tenenbaum*, 193 F.3d at 595. As this Court has noted, "[t]he State registers no gains toward its declared goals when it

separates children from the custody of fit parents." *Stanley v. Illinois*, 405 U.S. 645, 652 (1972).

2. The Interference with Individual Liberty Was Severe

To a nine-year-old girl, being confined behind closed doors for two hours with two male strangers, one of whom is armed, while being grilled repeatedly about intimate details of her relationship with her father, without explanation of the reason for the interrogation or when it will end, is a severe intrusion on her liberty, whether it happens at school or elsewhere. S.G. did not even know if she would be allowed to leave when the school day ended, and she ultimately lied in order to get out of the room. (J.A. 57) She suffered significant emotional trauma as a result of the interview.

The seizure here thus could not be more different than the seizure this Court approved in *Lidster*, where, in evaluating the traffic stops for reasonableness, the Court said:

> *Most importantly*, the stops interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect. Viewed objectively, each stop required only a brief wait in line – a very few minutes at most. Contact with the police lasted only a few seconds. . . . Police contact consisted of a request for information and the distribution of a flyer. . . . Viewed subjectively, the contact provided little

> reason for anxiety or alarm. The police stopped all vehicles systematically.

540 U.S. at 427-28 (emphasis added).

Here, in contrast, the detention was traumatic and lengthy, and it created enormous "reason for anxiety or alarm." Unlike the general traffic stop in *Lidster*, S.G. was singled out and taken from her classroom with no explanation. As a result, she felt sick even before the questioning began. Providing no explanation of who he was or why he was there, Camreta asked her – over and over – if her father touched her in "bad" ways, refusing to accept her repeated denials. It is difficult to imagine a scenario *more* calculated to create "anxiety or alarm" for a young child, or, indeed, for most adults. "Being . . . held by the police, even if for a few hours, is for most persons, awesome and frightening. . . . [A]n arrest abruptly subjects a person to constraints, and removes him to unfamiliar and threatening surroundings." ALI Model Code of Pre-arraignment Procedure, Commentary 290-91 (1975). It is completely unlike a few seconds of contact with a police officer who is seeking information – from all drivers – about an accident that occurred a week earlier.[39]

---

[39] Petitioners' and the United States' adamant refusal to acknowledge that the content of the interview is relevant to a reasonableness analysis reaches its apex when Camreta argues that the frightening, two-on-one, two-hour interview behind closed doors about S.G.'s family life is comparable to a school assembly with the mayor. Camreta Brief 31.

The intrusion is more significant than in *Lidster* for another reason. Here the intrusion was into not only S.G.'s Fourth Amendment right to be free of unreasonable seizure but also her own and her mother's Fourteenth Amendment-protected interest in family privacy and her mother's Fourteenth Amendment-protected interest in controlling what happens to her child. Respondent has already described Sarah Greene's constitutionally-protected interest in making the decisions she believes are in her daughters' best interest. *See* II.F., *infra*. But S.G. herself has an interest of constitutional significance "in preventing erroneous termination of the [family] relationship," *Santosky v. Kramer*, 455 U.S. 745, 760 (1982), and thus in not having her family life become the object of intrusive inquiry at the whim of a government official she had never even met. Here, the intrusion into those interests was significant and brutal, both in the room, where petitioners coerced S.G. into falsely accusing her father of abuse, and in the aftermath, when she and her sister were forcibly separated from their parents.

Petitioners and the United States, however, argue that the intrusion on S.G.'s liberty was *de minimis*, relying on the location of the custodial interrogation: at school. Petitioners and the United States even hint that, by sending S.G. to school, Sarah Greene somehow consented to all subsequent seizures of her daughter. Camreta Brief 33; Alford Brief 50-53; U.S. Brief 36. But, as discussed in II.D.2, *supra*, a school building is not a rights-free

zone. To the contrary, even in schools, despite some physical restrictions on student movements and despite school officials' legitimate need to keep order and discipline, students retain Fourth Amendment rights. This Court very recently reaffirmed those rights in *Safford Unified School District #1 v. Redding*, 129 S. Ct. 2633 (2009), holding that a school official violated a student's Fourth Amendment rights by strip-searching her to look for contraband.

Schoolchildren likewise retain their Fourth Amendment rights to be free of unreasonable seizures, notwithstanding petitioners' and the United States' claims that, as a schoolchild, S.G. was already in the "custody" or "control" of the government. Camreta Brief 10; Alford Brief 50-52; U.S. Brief 36. Children in schools have much greater freedom of movement than, for example, prisoners and mental hospital patients, who themselves retain some degree of freedom. *See Vitek v. Jones*, 445 U.S. 480 (1980) (transfer from prison to mental hospital). The former are in a lesser degree of custody than the latter, who are in a stricter form of custody that "give[s] rise to a constitutional 'duty to protect. . . .'" *Acton*, 515 U.S. at 655 (1995), *quoting Deshaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 200 (1989).[40] Thus, schoolchildren are legally as well as physically capable of being seized.

---

[40] Lower courts agree that schoolchildren are not in state custody to the same extent as prisoners. *Wyke v. Polk County*

(Continued on following page)

Schoolchildren, for example, can leave their classrooms to go to the bathroom or get a drink of water. They are generally free to move about at lunchtime, and they are free to leave the building at the end of the school day, a freedom which S.G. feared that petitioners would deny her. (J.A. 43) When government officials deprive the children of their residual liberty, the Fourth Amendment is implicated. Thus, it is inaccurate to say that "the liberty restrictions in [petitioners' custodial] interview [of S.G.] arise primarily from the custodial aspects of public schooling. . . ." U.S. Brief 26. To the contrary, the liberty restrictions upon S.G. arose specifically from petitioners, who held her against her will for two hours under circumstances completely unlike anything she normally experienced at school.[41]

School Board, 129 F.3d 560, 569 (11th Cir. 1997) ("the state simply does not restrict a student's liberty in the same sense that it does when it incarcerates prisoners . . ."); *Dorothy J. v. Little Rock School District*, 7 F.3d 729, 932 (8th Cir. 1993) ("school attendance does not entail so restrictive a custodial relationship . . . "); *Doe v. Claiborne County*, 103 F.3d 495, 510 (6th Cir. 1996) ("state's compulsory attendance laws do not sufficiently 'restrain' students . . ."); *Doe v. Hillsboro Independent School District*, 113 F.3d 1412, 1415 (5th Cir. 1997); *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364, 1370 (3d Cir. 1992).

[41] Petitioners' and the United States' arguments to the contrary suggest buyers' remorse about petitioners' concession that the interrogation of S.G. was a seizure under the Fourth Amendment. Petitioners long ago conceded the point. 588 F.3d at 1022. They should not be heard to contend otherwise at this late date.

The United States contends that petitioners' interrogation of her did "not involve physical restraint" and so somehow was not custodial. U.S. Brief 27. It is impossible to square this contention with the United States' own description (U.S. Brief 27) of *Florida v. Royer*, 460 U.S. 491, 502-03 (1983), as finding a "functional arrest where police in airport seized ticket, identification, and luggage of suspect waiting to board plane and took him to private room for interrogation," or its description of *Dunaway*, 442 U.S. at 212, as involving a "functional arrest where suspect was taken to police station and would have been restrained had he tried to leave." S.G. was no more able to leave the room where petitioners sequestered her than were the seized individuals in those cases.

3. The Seizure of S.G. Disserved the Public Interest

Finally, *Lidster* requires an analysis of the "degree to which the seizure advances the public interest." Petitioners and the United States address this question *only* by reference to the challenges of investigating child abuse. That is, they speak only about the ways in which being unable to undertake seizures like this one might impede investigations of child abuse. Such arguments, of course, can be made about the investigation of any crime – as the United States

concedes. U.S. Brief 28 n.5. If accepted, therefore, those arguments would become an engine of destruction of the Fourth Amendment.

More specifically, petitioners and the United States entirely overlook the significant ways in which interrogations of the sort petitioners engaged in actually *impede* the detection of child abuse, because they produce unreliable information.[42] And petitioners fail entirely to consider the public interests in not creating unnecessary trauma for the child and in not unnecessarily breaking families apart. Moreover, better options were available to petitioners. The evaluation of reasonableness cannot be made in a vacuum.

The child welfare field has, for many years, had protocols designed to elicit accurate and reliable information and to do so with a minimum of trauma to the child, protocols to be carried out at child advocacy centers, with specially trained staff.[43] One such child advocacy center is the KIDS Center, where S.G. eventually was evaluated. The KIDS Center was

---

[42] Although the court of appeals did not explicitly consider this issue, "[r]espondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted." *Smith v. Phillips*, 455 U.S. 209, 215, n.6 (1982).

[43] Pursuant to Congressional authorization, 42 U.S.C. §13002(a), the United States awarded grants of more than $10,000,000 to child advocacy centers in 2010. http://www.nationalchildrensalliance.org/index.php?s=71&item=13.

available to petitioners from the beginning of the investigation, and they have never offered any explanation for why they did not seek to have S.G.'s initial interview there.[44]

Petitioners repeatedly argue that because coordination between child welfare investigators and law enforcement is encouraged, even required, the seizure here was reasonable. Alford Brief 30, 42; Camreta Brief 29. That argument entirely misconstrues the nature of appropriate coordination, which includes creating child advocacy centers, reviewing their practices, and developing protocols for handling child abuse investigations. *See* Or. Rev. Stat. §418.747. That such coordination is required does *not* mean that any time a child welfare investigator and a police officer act together, they engage in appropriate or sanctioned "coordination." Indeed, coordination is required precisely in order to create and enforce protocols that will *prevent* the kind of freelancing that petitioners engaged in.

Oregon's own guidelines for interviewing suspected child abuse victims exemplify such protocols, and in fact rely on a raft of academic research, most

---

[44] Petitioners' failure to do so is particularly unaccountable because they asked Sarah Greene, in their first meeting with her, to take her daughters to the KIDS Center, which she agreed to do. (J.A. 49, 51) Moreover, Camreta actually delayed the girls' appointments, preventing a timely evaluation.

of which dates to the 1990s.[45] Those Guidelines, and the professional and academic consensus they reflect are – like the availability of the child advocacy center – relevant to any evaluation of reasonableness, and directly undermine petitioners' contentions that the type of seizure at issue here is necessary or even helpful for detecting child abuse. Petitioners' seizure of S.G. violated those Guidelines in numerous and significant ways, undermining the very public interest petitioners claim to be serving.

The relevant guidelines can be broken out into two related categories: making the child comfortable and ensuring that the interview results are reliable and untainted. As to the first category, petitioners did nothing to make S.G. comfortable. In violation of numerous guidelines and recommendations, she was singled out from her classroom; petitioners never introduced themselves; they did not tell her how long the interview might last. *See* Oregon Guidelines at 61-62. There was nothing child-friendly about the room she was in, which was an adult conference room. *Id.* at 42; *see also* Annon, *supra* ("avoid extremes, such as . . . a bare stark room with only adult furniture . . . "). Alford was in uniform and visibly armed. Oregon Guidelines at 43; Annon, *supra* (do not "dress in . . . a law enforcement . . . uniform"); "The Role of Law

---

[45] The Oregon Guidelines discussed here were adopted in 2004. Obviously, those particular Guidelines were unavailable when petitioners seized S.G., but the research on which the Guidelines are based predates S.G.'s seizure.

Enforcement in the Response to Child Abuse and Neglect," (n.6, *supra*) ("In all child interviews the officer should remove and secure his/her weapon so that it is out of sight"). And despite Camreta's referral of S.G. to the KIDS Center, he interrogated her in detail and at length about the allegations of abuse, violating recommendations both that the number of people and the number of interviews should be minimized, Guidelines at 25, 26, and, more specifically that "only minimal information should be gathered during the initial contact with the child" if "she is to be evaluated at a [child advocacy] center." *Id.* at 25.

Making the child comfortable, of course, is important to avoid traumatizing her, an important public interest in its own right. But it is also directly relevant to the second category: obtaining accurate and reliable information. Reliable evidence is important not only to avoid false accusations of abuse and the family tragedies that may ensue, but also to ensure that, when a child actually has been abused, the information she provides can be effectively used to protect her and, where appropriate, to prosecute the perpetrator. Put bluntly, the evidence needs to hold up in court. If it does not, the very public interest that petitioners claim to promote is undermined.

Petitioners' conduct could not have been more calculated to produce unreliable information. They failed to do any investigation prior to the interrogation, so they knew nothing about S.G.'s special language needs and did not accommodate them. As a

result, petitioners both increased S.G.'s discomfort *and* undermined the reliability of the interview. Guidelines at 60, 187-95. Camreta refused to accept S.G.'s denial of any abuse, although "interview bias is consistently associated with high rates of false reports among nonabused children." *Id.* at 38. He asked the same questions "over and over," he asked leading questions, and led S.G. to believe she could not leave until she told them what they wanted to hear. All of these are "unacceptable tactics," Guidelines at 168, long discredited in the child welfare field because they are likely to lead children to assent to false accusations of abuse. Guidelines at 26, 27, 131, 168, 191; Lamb, *supra*; Wakefield. And such overbearing tactics may well traumatize the child. Oregon Guidelines at 76. Here, those tactics did both things – produced not just unreliable, but outright false, information and contributed to the damage to S.G.'s mental health.

The unreliability of petitioners' tactics is well-established in the law as well as in the academic literature. The case law is replete with instances in which children have made false statements after prolonged coercive, leading questioning. *See, e.g., Friedman v. Rehal*, 618 F.3d 142, 156-57 (2d Cir. 2010) (collecting cases); *State v. Michaels*, 136 N.J. 299 (1994). Indeed, 20 years ago, this Court reviewed an interview of a purported sex abuse victim, in which the interviewer "failed to record the interview

on videotape, asked leading questions, and questioned the child with a preconceived idea of what she should be disclosing." *Idaho v. Wright*, 497 U.S. 805, 818 (1990). Because of those interviewing deficiencies, this Court ruled that the child's out-of-court statements were inadmissible at a criminal trial as lacking sufficient indicia of reliability. *Id.*

Petitioners' seizure of S.G. for questioning did not advance *any* public interest. The State of Oregon itself recognizes that coercive custodial interviews, like petitioners' detention and interrogation of S.G., are neither necessary nor helpful to protecting children from abuse. The State's own Guidelines could not be clearer. Petitioners' actions were thus not reasonable and therefore are unjustified by the Fourth Amendment, even under the reasonableness standard they argue for.

F. This Court Cannot Evaluate the Seizure by Reference to Its Inception Only

Petitioner Camreta asks this Court to decide *only* whether petitioners' seizure of S.G. was constitutional at its inception, and to disregard the scope of the detention and interrogation; the United States echoes that request. Camreta Brief 39; United States Brief 22 n.3, 31. This request for a truncated analysis is both bizarre in the context of this case and at odds with this Court's approach to evaluating the

reasonableness of searches and seizures. Moreover, this request is inconsistent with the analyses of both the district court and the court of appeals, and it is a limitation on the question before this Court that Camreta failed to articulate in his petition for certiorari.[46]

There is no support in this Court's jurisprudence for a division of petitioners' seizure of S.G. into two pieces, an "inception" and a "scope." Neither the United States nor Camreta has cited a single case in which this Court, when asked to evaluate the constitutionality of a search or seizure, has looked at only a portion of the incident, ignoring the remainder. When the specific facts of a case permit it, this Court has distinguished between the "inception" of a search and the continuation of that search. But that approach is for analytical clarity. *See, e.g., Terry*, 392 U.S. at 19-20 ("in determining whether the seizure and search were 'unreasonable' our inquiry is a dual one – whether the officer's action was justified at its inception, *and* whether it was reasonably related in scope to the circumstances which justified the interference in the first place") (emphasis added). *Terry* itself analyzed the conduct of the officer during the seizure.

---

[46] Camreta now claims that the "precise 'limitations which the Fourth Amendment places upon' a custodial suspected victim of child abuse 'will have to be developed in the concrete factual circumstances of individual cases.'" Camreta Brief 40. But this is such an individual case with concrete facts.

Moreover, *Terry* explicitly did not apply to the issue of "the constitutional propriety of an investigative 'seizure' upon less than probable cause *for purposes of* 'detention' and/or interrogation." *Id.* at 20 n.16 (emphasis added). Yet here, petitioners seized S.G. for the purpose of interrogating her, a purpose that they had in mind before the seizure and that they kept throughout the seizure. They even concede that they knew they might well detain her for a protracted period of time, claiming that child welfare interviews may "take longer than interviews in other contexts." Camreta Brief 40. Nothing happened to separate petitioners' conduct during the seizure from their purpose at its inception.

This situation thus is unlike *T.L.O.*, in which a principal's search of student's purse for cigarettes mutated into a search for marijuana. There, this Court held that a search of a student's purse is "'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school" and is "permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." 469 U.S. at 342. The *T.L.O.* court easily distinguished between the inception and the scope in that case because the "case actually involved two separate searches, with the first – the search for cigarettes – providing the suspicion that gave rise to the second

the search for marihuana." *Id.* at 343-44. No such dividing line exists here. Even before petitioners seized S.G., their plan was to remove her from her class, take her to an isolated location, and question her.

Camreta and the United States also fail to explain their division between "inception" and "scope." When did the "inception" become the "scope" – when the school employee, acting at petitioners' instructions, removed S.G. from her class? When the school employee walked out of the room, leaving S.G. behind closed doors with two adult male strangers, one of whom was in uniform, with a gun? When Camreta began asking S.G. questions about her pet cats? When he began asking her questions about sexual abuse by her father? When Camreta responded to her answers by saying, "No, that's not right"? Petitioners do not and cannot explain. The interview was one event, not a series of events, for purposes of Fourth Amendment analysis.

Camreta likely asks this Court to ignore the interrogation because petitioners' actions, throughout the interrogation, were constitutionally indefensible, even when evaluated under the reasonableness standard they tout. Indeed, Camreta's actions were so indefensible that neither he nor the United States even offer a defense of them, not even as an argument

in the alternative.[47] But neither does Camreta nor the United States make any particularized defense of his conduct at the "inception." Instead, Camreta makes the stunning claim that, because the government has an important interest in investigating and combating child abuse, all "seizures to investigate an allegation of child abuse by talking with a child at her school are constitutional at their inception."[48] Camreta Brief 34. He places no limitations whatsoever on this statement, not even a requirement of some particularized suspicion of abuse, but argues that investigators should be permitted to initiate such seizures based upon mere "speculation and hearsay." Camreta Brief 27, 37. This Court should reject that suggestion. First, such other seizures, if they exist (the record is devoid of evidence concerning other seizures), are not the subject of this case; only petitioners' seizure of

---

[47] This remarkable feature of Camreta's presentation bears repetition: *he offers no defense of the constitutionality of his conduct after the interview's "inception."*

[48] Alford makes similarly overbroad claims. He argues that as long as his actions were "driven by a legitimate concern about a problem of broad, general significance," he need not "demonstrate that [his] conduct was motivated by a public concern closely related to the specific facts of a particular search or seizure." Alford Brief 37. In other words, like Camreta, Alford argues that the state's interest in protecting children's well-being should insulate officials from any judicial scrutiny of how they conduct themselves. *Id.* 40, 43 (arguing that the Court should not review the means used to promote a state interest). But the best of intentions do not in fact justify any conduct a particular government official decides to undertake. The Constitution still applies.

S.G. is before this Court. More importantly, "speculation and hearsay" is a lower threshold than even the "reasonable suspicion" standard which this Court employs for *Terry* stops. Nothing in this Court's Fourth Amendment jurisprudence permits such a profound deprivation of liberty on such an ephemeral basis.

Camreta's claims are also inconsistent with *Lidster*. The *Lidster* court held that individualized suspicion was not directly relevant to the traffic stops it found constitutional. 540 U.S. at 424. But nothing in *Lidster* suggests that *every* traffic stop searching for witnesses would be constitutional. *Lidster* still required an individualized evaluation of the circumstances of the particular police actions. The reasoning of *Lidster* does not suggest, for example, that the police could set up such traffic stops anywhere. Rather, the location and time of day were selected to maximize the chance of identifying some witness to a particular accident.[9] *Lidster* emphatically did not hold that any time the police seek witnesses, instead of suspects, a traffic stop is necessarily – or even presumptively – constitutional. Moreover, *Lidster*, like *Terry* and *T.L.O.*, evaluated what happened

---

[9] Implicit in *Lidster*'s analysis was the fact that the police had no reason to think that any particular driver might have information. *Lidster* would have been a different case altogether if the police had set up a dragnet in order to track down and then interrogate at length a particular driver whom they thought had information – even if that particular driver was not himself a suspect.

during the seizure as well as its "inception." In *Lidster*, the brevity of the detention and the non-intrusive nature of its content were key factors in this Court's conclusion that the traffic stops were constitutional.

Camreta may make his stunningly overbroad claim – that *all* school-based child welfare interviews are constitutional at their inception – because, even under the reasonableness standard he touts and even looking only at his conduct *before* he spoke a word to S.G. about her father, the seizure was unreasonable. The seizure was unreasonable *looking at that stage alone* because:

> (1) Camreta knew nothing about the details of the third-hand allegations he was supposed to investigate – who made them, what specifically they said, whether they had any motive to lie;
>
> (2) Camreta failed completely to prepare for the interview by determining whether S.G. had any special needs that needed to be accommodated;
>
> (3) Camreta arranged to be accompanied by an armed, uniformed police officer;[50]

---

[50] It is true that S.G. testified that she did not find Alford frightening and did not feel threatened by him, but she also said that Alford "just sat there." (J.A. 60) Moreover, she was frightened by the interrogation. (J.A. 55) And there was no way for petitioners to know ahead of time how she would react to Alford. That is why the Oregon Guidelines and other expert protocols

(Continued on following page)

(4) Camreta did not make appropriate efforts to make S.G. comfortable: she was removed from class and brought to an adult conference room; he and Alford never introduced themselves, explained why they were there, or gave her an estimate of how long the interview might last;

(5) Camreta expected the interview to be lengthy;

(6) Most significantly, Camreta and Alford unaccountably undertook the initial interview of S.G. themselves, rather than refer her to the available child advocacy center – even though later that same day they asked her mother to take her there.

For all those reasons, even at the earliest stages of the encounter – even before Camreta asked S.G. a single question – the seizure was unreasonable as unnecessarily intrusive and not calculated to serve the public interests in protecting children from trauma, keeping families intact, or (the only public interest that Camreta acknowledges) detecting and protecting children from abuse.

♦

recommend *against* law enforcement wearing uniforms or carrying weapons during such interviews.

CONCLUSION

This Court should decline to review the court of appeals' Fourth Amendment ruling. Alternatively, it should dismiss the writ as improvidently granted as to the Fourth Amendment question presented. Under either alternative, the Fourth Amendment ruling should be left intact. If this Court does review the Fourth Amendment ruling, it should affirm that ruling.

Respectfully submitted,

MIKEL R. MILLER
LAW OFFICE OF
MIKEL R. MILLER, PC
26 NW Hawthorne Avenue
Bend, OR 97701
(541) 388-9819
mike@bendlaw.net

ROBERT E. LEHRER
LAW OFFICES,
ROBERT E. LEHRER
36 South Wabash Street,
Suite 1310
Chicago, IL 60603
(312) 332-2121
rlehrer@rlehrerlaw.com

CAROLYN A. KUBITSCHEK*
DAVID J. LANSNER
LANSNER KUBITSCHEK
SCHAFFER
325 Broadway, Suite 201
New York, NY 10007
(212) 349-0900
ckubitschek@Lanskub.com

CAROLYN SHAPIRO
565 West Adams Street
Chicago, IL 60661
(312) 906-5392
Cshapiro1@kentlaw.edu

Counsel for Respondents

**Counsel of Record*

Supreme Court, U.S.
FILED
FEB 18 2011
OFFICE OF THE CLERK

(35) (37)

Nos. 09-1454 and 09-1478

In the Supreme Court of the United States

BOB CAMRETA, Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

JAMES ALFORD, Deschutes County Deputy Sheriff, Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER BOB CAMRETA

JOHN R. KROGER
Attorney General of Oregon
*MARY H. WILLIAMS
Solicitor General
ANNA JOYCE
Deputy Solicitor General
1162 Court Street
Salem, Oregon 97301-4096
Phone: (503) 378-4402
mary.williams@doj.state.or.us
Counsel for Petitioner Bob Camreta

*Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

BOTH 69EE2J

42472

(29)

TABLE OF CONTENTS

Page

INTRODUCTION 1

ARGUMENT 3

A. The Ninth Circuit's Fourth Amendment holding—which binds all government officials investigating child-abuse allegations in the Ninth Circuit, including Camreta—is reviewable. 3

B. Because the Ninth Circuit's ruling affects Camreta's ability to carry out his job as a government official investigating allegations of child abuse, this case presents an Article III case or controversy. 9

1. Because the Ninth Circuit's opinion prevents Camreta from ever again using a formerly routine child-abuse investigation technique, whether he will conduct another interview with S.G. is immaterial for Article III purposes. 10

2. The State's interest in the outcome does not somehow deprive Camreta of a live Article III interest 12

3. If this case did present an Article III problem, this Court should vacate the Ninth Circuit's constitutional holding. 13

C. Where a protective-services caseworker seizes a child at school to determine whether she is a victim of abuse, the Fourth Amendment does not require the caseworker to first obtain a warrant 14

1. The seizure must be assessed under this Court's reasonableness balancing test 14

2. History does not establish that the Framers contemplated that seizures of the type here be affected only upon a warrant 18

3. This Court need not address the scope of the seizure because the Ninth Circuit did not address that question 21

4. This Court has before it only a single question of S.G.'s Fourth Amendment rights; it should not consider any rights that Greene now raises on her own behalf ... 22

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases Cited

Adams v. Robertson,
520 U.S. 83 (1997) 9

Bunting v. Mellen,
541 U.S. 1019 (2004) 4, 13

City of Erie v. Pap's A.M.,
529 U.S. 277 (2000) 9

Deposit Guar. Nat'l Bank v. Roper,
445 U.S. 326 (1980) 6, 7, 10, 11

Dunaway v. New York,
442 U.S. 200 (1979) 14

Electrical Fittings Corp. v. Thomas & Betts Co.,
307 U.S. 241 (1939) 6, 7, 11, 12

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,
528 U.S. 167 (2000) 10

Greene v. Camreta,
588 F.3d 1011 (9th Cir. 2009) 1, 3, 4, 21, 22

Illinois v. Lidster,
540 U.S. 419 (2004) 15, 17

Pearson v. Callahan,
555 U.S.__, 129 S. Ct. 808 (2009) 3, 5, 8

Saucier v. Katz,
533 U.S. 194 (2001) 5

Tenenbaum v. Williams,
193 F.3d 581 (2d Cir. 1999) 16

Terry v. Ohio,
392 U.S. 1 (1968) 14, 15, 21

United States v. Martinez-Fuerte,
428 U.S. 543 (1976) 15

Vernonia School District 47J v. Acton,
515 U.S. 646 (1995) 19-21

Constitutional and Statutory Provisions

U. S. Const. amend. XIV 22, 23

U.S. Const. amend IV ..... *passim*

U.S. Const. art. III 7-13

Other Authorities

Frank E. Vandervort,
Videotaping Investigative Interviews of Children in Cases of Child Sexual Abuse: One Community's Approach,
96 J. Crim. L. & Criminology 1353 (2006) 16

Thomas Y. Davies,
Recovering the Original Fourth Amendment,
98 Mich. L. Rev. 547 (1999) 19

Thomas Y. Davies,
The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista,
37 Wake Forest L. Rev. 239 (2002) 19

INTRODUCTION

Petitioner Camreta, a protective-services caseworker, has sought this Court's review of the Ninth Circuit's ruling that, under the Fourth Amendment, government officials who seize children at school to investigate claims of child abuse cannot do so in the absence of a warrant or an exception to the warrant requirement. Before responding to the merits of Camreta's constitutional argument, respondent asserts several barriers to this Court's review of that constitutional question. But none of those barriers in fact exist, clearing the way for this Court to review the question presented: whether the traditional warrant requirement applies to in-school seizures of suspected child-abuse victims.

The Ninth Circuit deemed the circumstances of this case "straightforward" and not "too case-specific" "to aid in clarifying the law for the future." *Greene v. Camreta*, 588 F.3d 1011, 1021-22 (9th Cir. 2009). Accordingly, it addressed the Fourth Amendment question—in addition to the qualified-immunity issue—"to provide guidance to those charged with the difficult task of protecting child welfare[.]" *Id.* Despite the deliberate breadth and effect of the Ninth Circuit's constitutional ruling, respondent contends that the Ninth Circuit's decision is "not reviewable" because the court ultimately ruled in favor of petitioner Camreta on qualified-immunity grounds. But the Ninth Circuit's qualified-immunity holding does not render its Fourth Amendment holding unreviewable *dicta*. The Ninth Circuit announced an expansive rule of constitutional law, one that the Ninth Circuit delib-

erately intended to be binding not only on Camreta, but on all government officials in the circuit. That binding precedent is reviewable by this Court. Relatedly, Camreta remains one of many government officials engaged in child-abuse investigations who are now prevented from seizing suspected victims at their schools, when that is the safest means of conducting the investigation. Therefore, respondent's claims that the constitutional question is moot and that Camreta lacks standing to challenge it fail.

The Ninth Circuit's sweeping Fourth Amendment ruling not only impacts all government officials conducting child-abuse investigations, but it does so in a manner that is fundamentally inconsistent with the principles underlying the Fourth Amendment and this Court's precedent. Respondent largely ignores those principles and that precedent in arguing that the Ninth Circuit properly held that a caseworker must obtain a warrant before seizing a suspected child-abuse victim in order to conduct an investigatory interview. Yet the reasonableness of the seizure in this case—and hence, its constitutionality—must be analyzed not by applying the same standards that apply to arrests of suspected criminals, but by balancing the government's interests in the seizure against the individual's liberty interests.

ARGUMENT

A. The Ninth Circuit's Fourth Amendment holding—which binds all government officials investigating child-abuse allegations in the Ninth Circuit, including Camreta—is reviewable.

The Ninth Circuit expressly used this case as an opportunity to define the constitutional parameters of child-abuse investigations throughout the circuit and to issue a significant legal holding that respondent now argues is unreviewable by this Court. *See Greene*, 588 F.3d at 1021-22 (explicitly stating that it was addressing the merits of the constitutional question because doing so "'promotes the development of constitutional precedent'", quoting *Pearson v. Callahan*, 555 U.S.__, 129 S. Ct. 808, 818 (2009)). The Ninth Circuit emphasized that announcing that constitutional holding was particularly important in this case because "the constitutional standards governing the in-school seizure of a student who may have been abused by her parents are of great importance." *Id.* The Ninth Circuit then broadly concluded that the "general law of search warrants applie[s] to child abuse investigations" and that government officials investigating child-abuse allegations should "cease operating" on the assumption that they could dispense with traditional Fourth Amendment protections. *Greene*, 588 F.3d at 1030, 1033.

Had the Ninth Circuit been able to stop at the point of its legal determination that the seizure in this case violated the Fourth Amendment, there would be no question that its Fourth Amendment

holding would be subject to review by this Court. However, because Camreta is a state employee who asserted his entitlement to qualified immunity, the Ninth Circuit necessarily proceeded to address that separate legal question. In doing so, it first acknowledged that its holding about the Fourth Amendment prohibitions on Camreta's behavior announced new law for the circuit. *Greene*, 588 F.3d at 1021 ("although other circuits have provided guidance to parents, school officials, social workers, and law enforcement personnel on the issue, we have not"). Therefore, the Ninth Circuit properly held that Camreta was entitled to qualified immunity on this one occasion. But the court made clear that the qualified-immunity holding was a narrow one that could not assist Camreta or any other government employee in future cases. That is, the court emphasized that its Fourth Amendment holding necessarily restricted the options available to Camreta—and to other government officials—in future cases involving child-abuse allegations. *Id.* at 1033 ("government officials investigating allegations of child abuse should cease operating on the assumption that a 'special need' automatically justifies dispensing with traditional Fourth Amendment protections in this context").

As a result, that constitutional ruling is subject to review. Petitioner recognizes, as he did in his petition for certiorari and opening brief, that this Court typically will not review judgments when the petitioner prevailed in the court below. *Bunting v. Mellen*, 541 U.S. 1019, 1023-24 (2004). But that general rule should not control where, as here, the lower court decision is intentionally designed to act as a prospective

limitation on government officials' actions. Lower courts no longer are obliged to rigidly adhere to the two-step sequential inquiry for qualified-immunity determinations adopted in *Saucier v. Katz*, 533 U.S. 194 (2001)—asking first whether the plaintiff has alleged a violation of a constitutional right and, second, whether the right was clearly established at the time of the defendant's conduct. In relieving lower courts of that obligation, this Court nevertheless emphasized that proceeding through both steps is "often beneficial" because it "promotes the development of constitutional precedent." *Pearson*, 129 S.Ct. at 818. The Ninth Circuit's Fourth Amendment ruling—an application of *Saucier*'s two-step procedure—indisputably is intended to have the kind of precedential effect that *Pearson* contemplated. But that constitutional precedent cannot both create clearly established law and be immune from appellate review.

And without the ability to obtain review in this case, Camreta and other protective-services caseworkers face an untenable choice. They must either comply with an arguably incorrect constitutional holding and risk being unable to investigate some child-abuse cases or ignore that holding and risk liability in order to have the constitutional ruling restated in a case that would be a more traditional vehicle for this Court's review. *Pearson*, 129 S.Ct. at 820 (government officials face the "unenviable choice" to either "comply with the lower court's" opinion or "defy the views of the lower court, adhere to practices that have been declared illegal, and thus invite new suits and potential punitive damages") (internal quotation marks, citations, and brackets omitted). That "unen-

viable choice" can—and should—be avoided by simply allowing for review of the constitutional ruling.

Respondent acknowledges that this Court previously has addressed claims from the party who prevailed in the underlying matter. Resp. Br. 25-26 (citing *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980); and *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939)). But respondent asserts that this Court has done so only where the claims are "collateral" to a ruling, and that the Ninth Circuit's broad constitutional pronouncement in this case is not sufficiently collateral to meet that test. *Id.* at 25-27. Neither assertion is supported by this Court's caselaw.

First, establishing that a ruling is "collateral" is not a necessary predicate to review. In *Deposit Guaranty National Bank*, this Court held that the plaintiffs—who prevailed on the merits of their claim—could appeal the denial of the motion to certify the class. 445 U.S. at 340. This Court noted that, although the general rule prohibits a prevailing party from appealing, "[t]he rule is one of federal appellate practice * * * derived from the statutes granting appellate jurisdiction and the historic practices of appellate courts; it does not have its source in the jurisdictional limitations of Art. III." *Id.* at 333-34. Consequently, "[i]n an appropriate case, appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III." *Id.* at 334. Because "the denial of

class certification stands as an adjudication of one of the issues litigated" and because the respondents asserted a continuing stake in the outcome of the appeal, the respondents were entitled to have the denial of the class certification reviewed. *Id.* at 336; *see also Electrical Fittings Corporation*, 307 U.S. at 242 (the defendants in a patent infringement case could obtain review of a lower court's ruling that the patent was valid—notwithstanding the lower court's conclusion that the defendants had not infringed upon it—because the patent infringement decree "purports to adjudge the validity of [the patent], and though the adjudication was immaterial to the disposition of the cause, it stands as an adjudication of one of the issues litigated.").

To be sure, this Court described the ruling in *Deposit Guaranty National Bank* as collateral to the ultimate ruling. 445 U.S. at 336. But rather than serving as a prerequisite to review, this Court was simply describing the particular ruling at issue in that case. The fundamental point that emerges from *Deposit Guaranty National Bank* is that an otherwise prevailing party can obtain review of a non-dispositive ruling so long as the ruling is an adjudication of one of the issues litigated and the party retains an Article III interest in the case. The Ninth Circuit's ruling here easily meets that standard. The Ninth Circuit created clearly established law in the jurisdiction when it held that protective-services caseworkers must obtain warrants before seizing children at their schools to interview them about child-abuse allegations. That ruling is binding against Camreta now, and in future child-abuse investigations. Accordingly, notwith-

standing that the Ninth Circuit ruled in Camreta's favor on qualified-immunity grounds, the Fourth Amendment question stands as one of the issues litigated and decided, and Camreta retains the ability to appeal from that ruling.

Second, even if respondent is correct that petitioner must affirmatively demonstrate that the ruling is "collateral" in order to obtain review, petitioner has done so here. Whether Camreta violated the Fourth Amendment and whether Camreta was entitled to qualified immunity are distinct legal issues. In fact, the separation between the merits of the constitutional question and whether the constitutional right was clearly established is what enabled this Court, in *Pearson*, to free courts from the obligation to address the two questions in a particular order. Here, the Ninth Circuit was not required to address the question whether Camreta violated S.G.'s constitutional rights. The court simply could have held that the law—regardless of what it is—was not clearly established at the time of the interview. But it opted to address the constitutional question to provide what it viewed as much-needed guidance for those conducting child-abuse investigations in the circuit. That substantive ruling was unnecessary—and thus collateral—to the Ninth Circuit's final judgment.

In short, the Ninth Circuit's holding was intentionally designed to serve as a constitutional guidepost for future child-abuse investigations. If that holding is unreviewable, government officials—including Camreta—complying with the ruling are unable to investigate some child-abuse allegations.

Those who defy the ruling risk new lawsuits and punitive damages. This Court should relieve petitioner of that unenviable choice and review the Ninth Circuit's Fourth Amendment holding.

B. Because the Ninth Circuit's ruling affects Camreta's ability to carry out his job as a government official investigating allegations of child abuse, this case presents an Article III case or controversy.

No dispute exists that if Camreta were to receive a report of child abuse today, the manner in which he investigated those allegations would be significantly constrained by the Ninth Circuit's Fourth Amendment ruling. Respondent nevertheless asserts that this case presents no Article III case or controversy. [1] Respondent maintains that Camreta has asserted no personal stake in this appeal because Camreta will likely never interview this particular victim again. Additionally, respondent declares that petitioner has "effectively concede[d]" that point, as evidenced by its

---

[1] Respondent raises these claims for the first time in her brief on the merits. Although Article III concerns may be raised at any time, in considering the weight to accord to respondent's contentions that the case is moot, the Court should be "influenced by [respondent's] failure, despite [her] obligation to the Court, to mention a word about the potential mootness issue in [her] brief in opposition to the petition for writ of certiorari." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000); *see also Adams v. Robertson*, 520 U.S. 83, 91 n.5 (1997) (parties are "obliged to [the Supreme] Court (not to mention their clients) to raise such threshold issues in their briefs in opposition").

focus on the harm that the Ninth Circuit ruling causes the government as a whole, rather than on Camreta individually. Resp. Br. 31. Respondent is wrong on both points. Camreta retains the personal stake in this appeal that Article III contemplates. The Ninth Circuit's ruling has an enduring impact on Camreta's ability to do his job, an impact that, in turn, leaves little question that there remains a live case or controversy. And although the State has an obvious interest in the resolution of the constitutional question presented here, Camreta does not rely on that interest to establish his own Article III interest.

1. Because the Ninth Circuit's opinion prevents Camreta from ever again using a formerly routine child-abuse investigation technique, whether he will conduct another interview with S.G. is immaterial for Article III purposes.

Article III, section 2 of the United States Constitution limits federal judicial authority to "cases" and "controversies." That constitutional limitation underlies the Court's standing and mootness jurisprudence. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180 (2000). To satisfy Article III, any litigant seeking appellate review must have a personal stake in the appeal. *Deposit Guar. Nat'l Bank*, 445 U.S. at 336 ("Federal appellate jurisdiction is limited by the appellant's personal stake in the appeal.").

Respondent rests her Article III arguments upon a fundamental premise: because little likelihood exists that Camreta will ever interview the victim again,

there is no live case or controversy. Resp. Br. 30-31. But respondent's narrow focus on the events that occurred between Camreta and the victim—or on events that might occur in the future between those two individuals—entirely misses the practical import of the Ninth Circuit's decision. Its decision was not, as explained above, limited to Camreta's single interview of the victim. Instead, the Ninth Circuit deliberately used this case to announce a new constitutional rule that applies to all child-abuse investigations in the circuit. Accordingly, every time that Camreta is called upon to conduct a child-abuse investigation at school and the interview is elevated to a seizure, the Ninth Circuit's decision will prevent him from using standard investigative techniques he otherwise might use. The Ninth Circuit's ruling thus operates as the functional equivalent of an injunction or declaratory judgment that prospectively prevents Camreta from carrying out his job duties in this manner. So framed, the Ninth Circuit's ruling creates a very live case or controversy that this Court can, and should, resolve.

Moreover, respondent's Article III argument is squarely at odds with this Court's caselaw. This Court has deemed Article III's requirements satisfied where, as here, a lower court's decision will have a *future* impact on the otherwise prevailing party. For instance, in *Electrical Fittings*, the prevailing petitioners' concern that "their success in some unspecified future litigation would be impaired by *stare decisis* or collateral-estoppel application of the District Court's ruling. . . . supplied the personal stake in the appeal required by Art[icle] III." *Deposit Guar. Nat'l Bank*, 445 U.S. at 337 (discussing holding in *Electri-*

cal Fittings). The same is true here: the Ninth Circuit's Fourth Amendment ruling affects Camreta's future conduct in his job. Indeed, the consequences of the Ninth Circuit's Fourth Amendment ruling here is substantially more certain than the concerns about "unspecified future litigation" asserted in *Electrical Fittings*.

Undoubtedly, the patent issue in *Electrical Fittings* was of ongoing significance to the *non-appealing* party as well as to the appealing party. And, as respondent notes, she has not appealed the Ninth Circuit's ruling. But any significance to the non-appealing party played no part in this Court's conclusion that Article III's requirements were satisfied. And this Court's caselaw is replete with examples of cases in which the non-appealing party had little or no interest in defending the lower court's judgment. *See* Brief for the United States at 18, citing cases. Thus, that respondent claims to have no on-going interest in the case is not dispositive of the Article III question.

2. The State's interest in the outcome does not somehow deprive Camreta of a live Article III interest.

Respondent also maintains that because petitioner focuses "exclusively on harm that might come to the State," and because the State is not a party to the case, it lacks standing to appeal. Resp. Br. 31. Respondent's premise is incorrect. To be sure, Camreta urged this Court to grant certiorari to consider the additional interests of the State of Oregon, in light of the unique impact qualified-immunity cases are de-

signed to have on state actors. But Camreta's argument that the State's interests should be considered *alongside* his own does not somehow divest him of a personal interest in the outcome of this appeal. Camreta still has an "individual interest" that "may be satisfied fully" by a favorable ruling from this Court. *Id.* Consequently, his interests easily satisfy Article III's requirements.[2]

3. If this case did present an Article III problem, this Court should vacate the Ninth Circuit's constitutional holding.

Respondent—after asking this Court to find that this case is moot or that Camreta lacks standing—has one last request: dismiss this appeal, but leave the Ninth Circuit's Fourth Amendment holding intact. Resp. Br. 41-43. If an insurmountable Article III problem does exist, this Court should reject that request. That is, if this Court concludes that the Ninth Circuit's Fourth Amendment ruling is unreviewable, that ruling should not also carry with it the same *stare decisis* effect that a reviewable holding would carry. As Justice Scalia noted in his dissent in *Bunting*, "in the unusual situation such as this where lack of standing precludes appeal, resolution of the constitutional question does not have *stare decisis* effect." 541 U.S. at 1025 n.*. Respondent should not be able to have it both ways: either the constitutional

---

[2] Respondent does not really contend otherwise. In other words, respondent does not appear to argue that Camreta *himself* lacks standing, only that if the State were substituting its own interests, the State would lack standing.

ruling is reviewable, or it is not. But if the constitutional ruling is not reviewable, it cannot carry with it the force of law in future cases.

C. Where a protective-services caseworker seizes a child at school to determine whether she is a victim of abuse, the Fourth Amendment does not require the caseworker to first obtain a warrant.

1. The seizure must be assessed under this Court's reasonableness balancing test.

The fundamental principle underlying the Fourth Amendment is that any seizure must be "reasonable." That determination, in turn, is shaped by the context of the particular seizure and requires a balancing of the government's interest against the intrusion on the individual's interests. *See* Pet. Br. 14-15; *see also* Brief for the United States 20-23. Yet respondent asserts that an interview of a suspected child-abuse victim at her school should not be assessed under a reasonableness standard. Resp. Br. 49-50. In respondent's view, such an interview requires a warrant based on probable cause. But in so arguing, respondent ignores the fundamental principle underlying the Fourth Amendment, namely, that a seizure is lawful so long as it is "reasonable."

Respondent's legal analysis, as far as it goes, accurately describes the law that pre-dated *Terry v. Ohio*, 392 U.S. 1 (1968). Prior to that time, the term "'arrest' was synonymous with those seizures governed by the Fourth Amendment." *Dunaway v. New York*, 442 U.S. 200, 208 (1979). Warrants were not required

for every seizure, but the probable cause requirement was "absolute." *Id.* That was true simply because, at that time, the probable cause standard struck the proper balance between government and individual interests without having to balance those interests in each case. *Id.*

But respondent largely overlooks the principles articulated in *Terry v. Ohio* and subsequent decisions: the Fourth Amendment does not impose an "irreducible requirement" of probable cause or a warrant. *United States v. Martinez-Fuerte*, 428 U.S. 543, 561 (1976). Instead, the reasonableness, or constitutionality, of any seizure must be assessed by balancing the governmental and individual interests at stake. Stated another way, in determining the constitutional prerequisites for the seizure at issue—a warrant, probable cause, reasonable suspicion, or something else—courts must balance the seizure's intrusion on the individual's privacy and liberty interests against its promotion of legitimate governmental interests. In *Terry*, that balancing resulted in the "reasonable suspicion" standard for a stop and frisk. 392 U.S. at 27. In *Illinois v. Lidster*, 540 U.S. 419 (2004), that balancing test—when applied to brief stops of motorists to determine whether they witnessed a crime—resulted in a determination that such stops can be reasonable even absent any suspicion at all. Here, as explained in petitioner's opening brief, the seizure was reasonable at its inception because the government's interest in protecting a child from abuse is substantial, particularly when balanced against the child's reduced privacy and liberty interests at school.

In short, respondent discounts the context-dependent balancing test that this Court has used consistently over the past 40 years. Adopting respondent's proposition would create uncertainty about the continued vitality of this Court's recent Fourth Amendment caselaw. In addition, it would render many reports of child abuse impossible to investigate. *See generally* States' Amici Brief; *see also* Frank E. Vandervort, *Videotaping Investigative Interviews of Children in Cases of Child Sexual Abuse: One Community's Approach*, 96 J. Crim. L. & Criminology 1353, 1354 (2006) ("Because of a lack of physical or medical evidence in most cases, and because [sexual-abuse] offenses by their nature typically take place in private, often the statements of the child who is the alleged victim are critically important, and perhaps the only, evidence"). Indeed, respondent acknowledges as much. *See* Resp. Br. 60 ("'there may be circumstances in which the law of warrant and probable cause established in the criminal setting does not work effectively in the child removal...context'") (citing *Tenenbaum v. Williams*, 193 F.3d 581, 604 (2d Cir. 1999)). In respondent's view, however, the difficulty in any given case of investigating a child-abuse allegation cannot define the constitutional rule. Resp. Br. 52-53.

That much is true. Petitioner does not, of course, suggest that the challenges inherent in investigating child-abuse allegations render the Fourth Amendment inapplicable to those investigations. But the nature of child abuse—and the manner in which allegations of child abuse must be investigated—very much informs the assessment of the government's interest

in a particular investigative technique, which in turn informs the constitutional analysis. Child abuse—and in particular, child sexual abuse—is a crime that most frequently occurs with the knowledge only of the abuser and the victim. The government frequently will not have the quantum of evidence needed to obtain a warrant before talking with the victim about whether the abuse occurred. Delaying talking with the victim until further investigation can be completed—investigation which may or may not lead to enough evidence to obtain a warrant—means leaving the victim unprotected from additional abuse. Each of these considerations influences the government's interests in detecting and preventing child abuse.

Nor should this Court accept respondent's assertions that the duration of a seizure dictates the constitutionality and that brevity is central to what the Fourth Amendment permits the government to do in carrying out a significant interest.[3] Resp. Br. 64 ("*Lidster* expressly relied on the brevity of the stops in question . . . . Nor is *Lidster* the only case to consider the importance of the length of a detention."). While respondent accurately conveys that the short duration of the stops at issue in *Lidster* played a significant role in this Court's analysis, this Court has never held that brevity is a constitutional mandate. Instead, the reasonableness of any seizure must be

---

[3] Respondent's argument on this point focuses on the reasonableness of the scope of the seizure, rather than on the reasonableness of the seizure at its inception. As explained in more detail below, the scope of the seizure of S.G. is not a question that this Court need decide.

considered in its context. That, in turn, means that the amount of time that a seizure takes is not, in and of itself, dispositive of its constitutionality. The limited duration of the seizure in *Lidster* was important because the roadside stop of motorists to determine whether any had been witness to a recent crime did not exceed what was necessary to obtain that information.

The circumstances of a seizure to ask a child whether her father is sexually abusing her are far different. Interviews of that nature cannot reasonably be expected to be completed in a matter of moments. To avoid further traumatizing the child, the interviewer must establish a rapport, assess the child's level of functioning and ability to communicate, and then broach a tremendously sensitive, private, and potentially volatile subject. That process takes far longer than asking a witness whether he or she was witness to a fatal car crash. But the fact that a warrantless interview of that nature may take a significant amount of time does not, as respondent suggests, render it unconstitutional. Rather, the duration of the seizure must be considered in light of the reasons for that seizure, bearing in mind that the ultimate inquiry is whether the seizure is reasonable.

2. History does not establish that the Framers contemplated that seizures of the type here be affected only upon a warrant.

Respondent claims that the historical record clearly establishes that, in the absence of a warrant or court order, the Framers would have disapproved of a protective-services caseworker and a police officer

interviewing a student in a public school to investigate a report of child abuse. Resp. Br. 46-48. Yet respondent simply is wrong in her contention that history—particularly that of magistrates requiring recognizances—answers the issue presented here.

As petitioner explained in his opening brief, there was no founding-era practice of protective-services caseworkers conducting interviews to investigate child-abuse reports. *See Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995) (no founding-era practice of random drug-testing of student athletes to resolve the legal question presented). More generally, there was an absence of any comparable form of criminal investigations. When the Founders adopted the Bill of Rights, police departments and professional law-enforcement officers did not exist. Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 620 (1999). The peace officer was most commonly a constable whose role was to protect order. *Id.* at 620-21. The constable's authority and duties did not involve "ferreting out crime" and the type of modern pre-charge investigation that police officers commonly perform today. *Id.* at 621-23, 620 n 194, 621 n 196; Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 Wake Forest L. Rev. 239, 423-25 (2002). The initiation of a criminal case largely hinged on an aggrieved private party stepping forward and making a complaint. Davies, 98 Mich. L. Rev. at 622. In short, at the time the Founders adopted the Fourth Amendment, law-enforcement officers simply would not have

been involved in an interview of the kind that occurred here. And because officers were not routinely engaged in this type of investigation, the constitutionality of seizures of this kind is "judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Vernonia*, 515 U.S. at 652-53 (internal quotation marks and citations omitted).

Respondent points to the fact that, under common law and under an early congressional act in this country, magistrates could require recognizances from material witnesses to ensure their appearance at trials. Resp. Br. 46-48. That historical analogy is not apt. In-school child interviews and witnesses testifying at criminal trials are, on their face, different "practices" involving very different locations, considerations, and circumstances. An in-school child-abuse interview to substantiate or refute a report of child abuse is an early step—and often the first step—in an investigation to determine whether a crime was even committed. In contrast, the material witness warrant protected the Framer's interests in ensuring the integrity, accuracy, and fairness of trials. There is no historical evidence that the Framers would have countenanced a similar warrant process in the investigatory phase of a case, such as the interview at issue here.

In sum, given the absence of any analogous founding-era proactive criminal investigations, much less in-school child-abuse interviews, this Court must look beyond history for the answer to whether this type of seizure violated the Fourth Amendment. The reason-

ableness must instead be judged by balancing the government's interests against the individual's liberty interests. *Vernonia*, 515 U.S. at 652-53.

3. This Court need not address the scope of the seizure because the Ninth Circuit did not address that question.

Evaluating the constitutionality of any seizure entails a two-part inquiry: whether the seizure was justified at its inception and whether it was justified in its scope. *Terry*, 392 U.S. at 19-20 (balancing involves a dual reasonableness inquiry: "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place."). According to respondent, petitioner has urged this Court to "disregard" the question whether the seizure's scope was justified. Resp. Br. 94. It appears that respondent misunderstands petitioner's argument. Petitioner simply asks this Court to review the only question that the Ninth Circuit reached: whether the seizure was justified at its inception.

Because the Ninth Circuit concluded that the seizure's inception was unconstitutional, it did not address the question whether the scope of the seizure was also unconstitutional. *Greene*, 588 F.3d at 1030. Thus, petitioner does not suggest that this Court ignore the scope question. Rather, based on the procedural posture of this case, this Court simply does not

have before it the question whether the seizure was justified in its scope.[4]

4. This Court has before it only a single question of S.G.'s Fourth Amendment rights; it should not consider any rights that Greene now raises on her own behalf.

Finally, it bears noting the parameters of the specific Fourth Amendment claim at issue here. The only issue for review is whether Camreta and Alford violated S.G.'s Fourth Amendment rights. Greene, on behalf of S.G., filed a host of other claims in district court, including claims that Camreta had violated Greene's due-process rights under the Fourteenth Amendment. *Greene*, 588 F.3d at 1020. Those claims have been remanded to the district court. *Id.* at 1037. Although respondent and various *amici* emphasize Greene's constitutional rights as a parent, those rights are not at issue here and are not before this Court.

---

[4] For this same reason, this Court should not consider respondent's argument that Camreta failed to follow Oregon Interview Guidelines for interviewing children suspected of having been abused. That is, what transpired during the interview encompasses questions relating to the scope of the interview, not whether the interview was reasonable at its inception. In all events, petitioner does not concede that Camreta failed to follow the guidelines in conducting his interview of the victim here.

If what respondent means to argue is that the Fourth Amendment itself requires consideration of parents' rights, then respondent is improperly injecting into the Fourth Amendment analysis a parent's Fourteenth Amendment right of control over his or her children. The assessment whether a child's *personal* Fourth Amendment rights are violated when a government official temporarily seizes the child in conducting the interview is not affected by a separate constitutional right that belongs to the parent only. Stated differently, the intrusion on parental rights that may result from the subject matter of the interview has no bearing on the determination whether the restraint on the child's freedom of movement violates the child's constitutional right to be free from unreasonable seizures—a right that is personal to the child and whose scope is not dependent on a parent's separate constitutional right.

CONCLUSION

The Ninth Circuit concluded that when a protective-services caseworker seizes a child at her school to determine whether she is being abused, the caseworker first must obtain a warrant. That far-reaching constitutional holding—on an issue of first impression in the circuit that is binding on any future similar investigations going forward—is reviewable by this Court. And guided by the salient Fourth Amendment principle that all seizures be "reasonable," and balancing the government's strong interests in protecting children from abuse against the child's lesser liberty interests, this Court should conclude that the in-

terview here was reasonable and therefore constitutional.

Respectfully submitted,

JOHN R. KROGER
Attorney General of Oregon
MARY H. WILLIAMS
Solicitor General
ANNA JOYCE
Deputy Solicitor General
Counsel for Bob Camreta

Supreme Court, U.S.
FILED
FEB 22 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

JAMES ALFORD,
DESCHUTES COUNTY DEPUTY SHERIFF,

Petitioner,

v.

SARAH GREENE, personally and as
next friend for S.G., a minor, and K.G., a minor,

Respondents.

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, personally and as
next friend for S.G., a minor, and K.G., a minor,

Respondents.

**On Writs Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit**

PETITIONER JAMES ALFORD'S REPLY BRIEF

CHRISTOPHER DENNIS BELL
Counsel of Record
Assistant Legal Counsel
STEVEN EDWARD GRIFFIN
Assistant Legal Counsel
OFFICE OF DESCHUTES COUNTY LEGAL COUNSEL
1300 NW Wall Street, Suite 205
Bend, OR 97701
541-388-6624
christopher_bell@co.deschutes.or.us
steven_griffin@co.deschutes.or.us

Attorneys for Petitioner
Deschutes County Deputy Sheriff James Alford

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
I. Respondents Misframe the Issues; This Case is About One Initial Step in the Continuum of Child Protection Investigations, Not the Entire Child Welfare System	2
II. The Ninth Circuit's Fourth Amendment Ruling is Reviewable	5
III. Respondents Have Not Established Alford's Appeal is Moot	6
IV. Should the Court Find This Appeal is Moot as to Petitioner Alford, the Court Should Vacate the Judgment of the Court of Appeals	9
V. The Presence of Deputy Alford at S.G.'s Interview Does Not Preclude the Application of the "Special Needs" Doctrine	11
A. *Ferguson's* "Primary Purpose/Immediate Objective" Standard Does Not Apply	12
B. There Was Not Excessive Law Enforcement Involvement in S.G.'s Interview	18
CONCLUSION	24

TABLE OF AUTHORITIES

Page

CASES

Adarand Constructors, Inc. v. Slater, 528 U.S. 216 (2000) 7

Alvarez v. Smith, 130 S.Ct. 576 (2009) 9

Cardinal Chemical Co. v. Morton International, Inc., 508 U.S. 83 (1993) 6

Deakins v. Monaghan, 484 U.S. 193 (1988) 9

Ferguson v. City of Charleston, 532 U.S. 67 (2001) ..... *passim*

Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167 (2000) 6, 7, 9

Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009) 12

Griffin v. Wisconsin, 483 U.S. 868 (1987) 15, 16, 17

Honig v. Doe, 484 U.S. 305 (1988) 7

Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) 16, 17

New Jersey v. T.L.O., 469 U.S. 325 (1985) 11, 24, 25

New York v. Burger, 482 U.S. 691 (1987) 15, 16, 17

Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701 (2007) 8, 9

U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994) 10, 11

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 16, 17

TABLE OF AUTHORITIES – Continued

Page

United States v. Concentrated Phosphate Export Association, 393 U.S. 199 (1968) 6

United States v. Munsingwear, Inc., 340 U.S. 36 (1950) 9, 10, 11

Vernonia School District 47J v. Acton, 515 U.S. 646 (1995) 23

STATUTES

Or. Rev. Stat. § 418.747(5) 21, 23

Or. Rev. Stat. § 419B.007 18

Or. Rev. Stat. § 419B.010 (2001) 18

Or. Rev. Stat. § 419B.010(3) 19

Or. Rev. Stat. § 419B.015 19

Or. Rev. Stat. § 419B.020(1)(a) 19

Or. Rev. Stat. § 419B.020(2) 20, 21

Or. Rev. Stat. § 419B.035(1) & (2) 22

Or. Rev. Stat. § 419B.035(5) 19

Or. Rev. Stat. § 419B.175 21

Or. Rev. Stat. § 419B.185(1) 21

OTHER AUTHORITIES

C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4421, p. 559 (2d ed. 2002) 10

TABLE OF AUTHORITIES – Continued

Page

RULES

Or. Admin. Rule 413-020-0430(3)(A) (2002) 20

INTRODUCTION

This Reply Brief addresses three separate arguments made by Respondents in response to Alford's brief on the merits. The first two do not go to the merits, but to Alford's ability to bring his appeal before the Court. Respondents assert the Ninth Circuit's judgment is not reviewable and that Alford's appeal is moot. The third of Respondents' arguments is that, given this Court's holding in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), the "special needs" doctrine is inapplicable to interviews like the interview of S.G. Alford believes the Ninth Circuit's judgment is reviewable and that Respondents have failed to demonstrate this appeal is moot. Alford also believes the "special needs" doctrine applies to interviews of the sort involved here, and both the Ninth Circuit's holding below and Respondents' arguments to the contrary are without merit. For these reasons, as well as the issues of law addressed in Alford's brief on the merits, the Court should hold the interview of S.G. did not violate the Fourth Amendment and announce a legal standard to govern such interviews as requested in Alford's brief on the merits.

ARGUMENT

I. Respondents Misframe the Issues; This Case is About One Initial Step in the Continuum of Child Protection Investigations, Not the Entire Child Welfare System.

Before addressing the specific points referenced above, Alford is compelled to clarify precisely what is at issue in this case. Respondents' brief and the many *amicus curiae* briefs filed in support of Respondents muddy the waters of this case by stirring in wide swaths of issues and arguments that are not applicable to the questions before this Court. It is therefore appropriate to attempt to calm those waters, allowing the silt of inapposite arguments to settle to the bottom and the relevant points from the briefs on all sides to float to the surface for closer inspection. To do so, it is as important to make clear what this case is *not* about, as it is to make clear what is actually at issue.

This case is not about best practices for interviewing children who are suspected of being abused, including the use of centers where children can be taken for forensic interviews, or the need for interviewers to be trained to properly conduct such interviews so as to avoid emotionally harming children, achieving inaccurate results, or both. Taking a child from school grounds to a children's center that may be located miles away for a full recorded forensic interview, as suggested by Respondents in their brief, raises Fourth Amendment issues beyond an initial interview at the public school itself, and certainly

beyond the issues presented here. Plus, such forensic interviews are usually a second or third step in the continuum of child protection investigations that begin with talking to the child. In the trenches of child protection, it will always be trained peace officers and social workers doing the initial interviews of children, many of which will rule out the need for further investigative action or bringing the child into protective custody, after a public school interview is concluded.

Nor is this case about the standards of proof and other practices used by juvenile courts throughout this nation to remove children from their parents after a finding of abuse or neglect, the provision or denial of services, or the termination of parental rights, none of which may ever occur in a particular case. Indeed, which may never occur because a public school interview by a social worker or law enforcement officer took place, and these child protection professionals were able to determine based on the interview that further investigative and protective steps need not be taken.

It is also not about the ongoing debate regarding how this nation should protect children and families where abuse has been alleged. That debate has existed at least since the late 19th Century and continues today throughout this country and the world. (*See* Pet. Brief, 16-20) Continued debate is a good thing, keeping the system honest, dynamic, and ever improving. But this case is not about that

debate, which is one appropriately left to legislators and policy makers.

Finally, this case is not about family privacy concerns or parents' interests in the care, custody or control of their children. While undeniably parents have such rights, they are simply not implicated in the Fourth Amendment question before the Court. That this is so is evident from the fact that the Ninth Circuit did not even mention these rights in its analysis of S.G.'s interview, and that these rights have not factored into this Court's previous holdings regarding the Fourth Amendment rights of children in public schools. Indeed, it is clear Respondents did not address these issues before the Ninth Circuit as to S.G.'s interview, and therefore they were not preserved for appeal. Clearly, the *only* issue for review here is whether Alford and Camreta violated Respondents' Fourth Amendment rights.

Instead, this case is about one distinct point in the child protection system, a defining point at or near the very first steps in a child welfare investigation: Does a public school interview by law enforcement and social workers of a suspected child abuse victim implicate the Fourth Amendment, and if so, what standard should be utilized to ensure such interviews are reasonably undertaken?[1]

---

[1] Because this appeal arose out of a favorable summary judgment ruling on qualified immunity, Alford did not challenge the trial court's conclusion based on the evidence viewed in favor

(Continued on following page)

II. The Ninth Circuit's Fourth Amendment Ruling is Reviewable.

Respondents argue Alford and Camreta cannot appeal the judgment below because the Ninth Circuit upheld the district court's qualified immunity ruling and thus, as prevailing parties, they are prohibited from appealing the judgment. In his merits brief, Camreta argues why the Ninth Circuit's qualified immunity ruling should not preclude review of the Fourth Amendment ruling in the decision below. (Camreta Merits Brief, 41-44). In its amicus brief, the United States also argues constitutional ruling is reviewable notwithstanding its grant of qualified immunity to both petitioners. (United States Amicus Brief, 11-20). As he did in his merits brief (Petitioner's Merits Brief, 4), Alford adopts the arguments of Camreta and the United States as to the reviewability of the judgment below. For the reasons stated by Camreta and the United States, review of the court of

---

of the non-moving party that a seizure had occurred. The Ninth Circuit, however, concluded the interview was a seizure at its inception due to the presence of an armed peace officer. Although Alford did not directly raise that issue in its Petition for Writ of Certiorari, Alford acknowledges it has now been raised by two of its amicus and impliedly supported by a third. Having been raised, Alford agrees that whether the interview implicated the Fourth Amendment at its inception is an antecedent and fairly included issue that should be reached by this Court. And Alford agrees that absent egregious circumstances, a public school interview of a suspected child abuse victim does not implicate the Fourth Amendment at its inception, even when conducted by an armed, uniformed peace officer.

appeals' constitutional ruling by this Court is appropriate.

III. Respondents Have Not Established Alford's Appeal is Moot.

Respondents claim this appeal is moot as to Alford because he is no longer employed as a deputy sheriff with the Deschutes County Sheriff's Office. The Court's test where mootness is asserted because of the voluntary conduct of a defendant, is to determine "if subsequent events [have] made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189-90 (2000) (quoting *United States v. Concentrated Phosphate Export Association*, 393 U.S. 199, 203 (1968)).

The burden of a party asserting mootness to come forward with sufficient evidence to demonstrate an appeal has become moot is "formidable." *Friends of the Earth, Inc.*, 528 U.S. at 189-90 ("[t]he heavy burden of persuading the [C]ourt that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness"); *Cardinal Chemical Co. v. Morton International, Inc.*, 508 U.S. 83, 98 (1993) (the party asserting that the controversy has become moot since the rendering of the judgment below "bears the burden of coming forward with the subsequent events that have produced the alleged result"). Where sufficient evidence is not

produced to demonstrate with "absolute clarity" that the wrongful behavior could not reasonably be expected to occur, the Court has refused to dispose of an appeal for mootness. *Friends of the Earth, Inc.*, 528 U.S. at 193; *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) ("Because, under the circumstances of this case, it is impossible to conclude that respondents have borne their burden of establishing that it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to occur,' petitioner's cause of action remains alive.")

The Court has substantial flexibility in applying the doctrine of mootness, and often allows for review in an appeal where the alleged continuing stake in a controversy is somewhat speculative. *Friends of the Earth, Inc.*, 528 U.S. at 190-92 ("The plain lesson of these cases is that there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness."). *See also, Honig v. Doe*, 484 U.S. 305, 330-31 (1988) (Rehnquist, C.J. concurring).

This flexibility is apparent in many of the Court's mootness decisions. For instance, in *Friends of the Earth, Inc., supra*, 528 U.S. at 193, the Court held that in view of the defendant's continuing permit to discharge pollutants (the terms of which it had previously violated), defendant's post-complaint decision to close its facility, thereby halting the discharge of pollutants, did not moot the appeal, as it was not "absolutely clear the permit violation could not reasonably

be expected to occur." Similarly, in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 551 U.S. 701, 702 (2007), a case in which the petitioners challenged a policy of the respondent school district which relied on race to determine the schools certain children could attend, the Court held the school district failed to demonstrate the injuries claimed by the petitioners were too speculative to give the Court jurisdiction to hear the appeal. In so holding, the Court stated, "The fact that Seattle has ceased using the racial tiebreaker pending the outcome here is not dispositive, since the district vigorously defends its program's constitutionality, and nowhere suggests that it will not resume using race to assign students if it prevails." *Id.* In each case, despite the fact that the respondents had ceased the complained of activity, the Court found such cessation insufficient to demonstrate that the appeals involved were moot where there was no indication that such activities could not be resumed.

For similar reasons, Respondents in this case fail to satisfy their burden to demonstrate Alford's appeal is moot. Respondents base their mootness argument on the fact that Alford no longer works as a deputy sheriff in Deschutes County. However, this does not make it "absolutely clear" that Alford could not return to work as a deputy sheriff and resume the conduct complained of by Respondents in their complaint. Respondents have made no showing that Alford would not return to work as a deputy sheriff, nor have they provided any evidence to indicate whether

Alford has the desire or the ability to return to such a position. As shown in *Friends of the Earth, Inc.*, and *Parents Involved in Community Schools*, the simple fact that Alford has ceased working as a deputy sheriff does not establish his appeal is moot. Thus, Respondents fail to satisfy their formidable burden to establish the activities complained of as to Alford could not reasonably be expected to resume.

IV. Should the Court Find This Appeal is Moot as to Petitioner Alford, the Court Should Vacate the Judgment of the Court of Appeals.

When a civil case becomes moot pending appellate review, "the established practice . . . in the federal system . . . is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-40 (1950); *Deakins v. Monaghan*, 484 U.S. 193, 200 (1988) ("When a claim is rendered moot while awaiting review by this Court, the judgment below should be vacated with directions to the District Court to dismiss the relevant portion of the complaint.") Vacatur "'preserve[s] the rights of all parties,' while prejudicing none 'by a decision which . . . was only preliminary.'" *Alvarez v. Smith*, 130 S.Ct. 576, 581 (2009) (quoting *Munsingwear, Inc.*, 340 U.S. at 39-40). Such a disposition "strips the decision below of its binding effect," *Deakins*, 484 U.S. at 200, and is "commonly utilized . . . to prevent a judgment, unreviewable because of mootness, from spawning any legal

consequences." *Munsingwear, Inc.*, 340 U.S. at 41. *See also,* C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4421, p. 559 (2d ed. 2002) (issue preclusive effect denied to non-appealable findings; "[s]ince appellate review is an integral part of the system, there is strong reason to insist that preclusion should be denied to findings that could not be tested by the appellate procedure ordinarily available").

Vacatur is generally required when mootness occurs through happenstance, i.e., "through circumstances unattributable to any of the parties, or where it results from the unilateral action of the party who prevailed in the lower court." *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership,* 513 U.S. 18, 23 (1994). Here, Respondents assert the case was rendered moot when the Ninth Circuit ruled Alford was entitled to qualified immunity and issued a judgment in his favor. If Respondents are correct, then clearly under the authority discussed above, vacatur of the Ninth Circuit's judgment as it pertains to Alford is appropriate.

Despite this clear authority, Respondents assert the Court should leave the court of appeals' opinion intact. (Response Brief, pp. 41-43) However, this assertion ignores the established practice of this Court to vacate judgments in circumstances such as these. As the Court stated in *Munsingwear*, vacatur is generally utilized to deny preclusive effect to the unreviewable findings of an appellate court. 340 U.S. at 41. This practice stems from recognition by the Court that the ends of justice are best served by

vacating the judgment where circumstances unrelated to the controversy between the parties render a case moot:

> The reference to "happenstance" in *Munsingwear* must be understood as an allusion to this equitable tradition of vacatur. A party who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment. . . . The same is true when mootness results from unilateral action of the party who prevailed below.

U.S. Bancorp Mortgage Co., 513 U.S. at 25 (citations omitted). Vacatur is appropriate here for precisely the same reasons.

For these reasons, should the Court determine that Alford's appeal is moot, that portion of the Ninth Circuit's judgment pertaining to Alford should be vacated, and the case should be remanded with directions to dismiss.

V. The Presence of Deputy Alford at S.G.'s Interview Does Not Preclude the Application of the "Special Needs" Doctrine.

In its decision below, the Ninth Circuit held *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) precluded application of a reasonableness standard similar to the standard announced in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) to the interview of S.G. because it believed "law enforcement personnel and

purposes" were too deeply involved in her interview. *Greene v. Camreta*, 588 F.3d 1011, 1027 (9th Cir. 2009). Thus, rather than balancing the government's interests in the interview against S.G.'s expectations of privacy, the court held the "general law of search warrants" applies to such interviews where law enforcement personnel or purposes are involved. *Id.* at 1030. Respondents essentially parrot this view in their arguments in response to Alford's appeal. (Response Brief, 70-74) However, as shown below, the Ninth Circuit was simply wrong in holding that *Ferguson* requires a warrant or a warrant exception in this case. And, for this reason, Respondents' reliance on *Ferguson* is misplaced.

A. *Ferguson's* "Primary Purpose/Immediate Objective" Standard Does Not Apply.

In *Ferguson*, the Court considered a suspicionless drug testing policy which was defended as a reasonable measure to advance a "special governmental need." 532 U.S. at 75-76. Under the policy, a state hospital collected urine samples from certain maternity patients and tested them for the presence of cocaine. *Id.* at 71. Those patients who tested positive were expressly given a choice – obtain substance abuse treatment or be arrested. *Id.* at 72. The Court rejected the assertion that the policy at issue advanced a special government interest, and reviewed the drug testing policy itself to determine whether the "primary purpose" of the policy was "ultimately indistinguishable from the general interest in crime

control." *Id.* at 81-86. The Court found it was clear from the record "the focus of the policy was on the arrest and prosecution of drug abusing mothers." *Id.* at 82.

The Court identified nine different features of the program which, in its opinion, conclusively demonstrated the "general law enforcement purpose" of the searches: (1) the "initial and continuing focus" of the policy was on the arrest and prosecution of drug abusing mothers; (2) the document codifying the search policy incorporated the "police's operational guidelines;" (3) significant attention was paid to "chain of custody [of evidence], the range of possible criminal charges, and the logistics of police notification and arrests;" (4) the policy did not discuss different courses of medical treatment for either mother or infant; (5) police and prosecutors were instrumental in the development of the policy and its day-to-day administration; (6) law enforcement officials "helped determine procedures to be followed when performing" medical screens; (7) police had routine access to confidential medical files for the purpose of determining whether mothers should be prosecuted; (8) police "took pains to coordinate the timing and circumstances of criminal arrests with medical staff;" and (9) the threat of criminal prosecution was "essential to the program's success." *Id.* at 72, 82.

Based upon the above, the Court held that the policy's "ultimate goal" of encouraging drug rehabilitation could not be overshadowed by the fact that the policy's "immediate objective" was to "generate

evidence for law enforcement purposes in order to reach that [ultimate goal]." *Id.* at 83. Thus, the Court concluded that while the "ultimate" purpose of the policy was to get expectant mothers who tested positive into treatment and off drugs, the "immediate" means of accomplishing this purpose was the generation of evidence for criminal prosecution of the women who were tested. *Id.* at 83-84 ("[T]he central and indispensable feature of the policy from its inception was the use of law enforcement to coerce patients into substance abuse treatment."). This distinction was critical for the Court, and led it to conclude the primary purpose of the policy was to "use the threat of arrest and prosecution in order to force women into treatment." *Id.*

Critically, the ultimate goal of the drug testing policy in *Ferguson* – to get drug using expectant mothers into treatment – was *completely dependent* upon the immediate threat of prosecution to achieve its goal. *Id.* at 72. Without the prosecutorial component of the program, there was no means to ensure the expectant mothers would seek treatment. In this respect, *Ferguson* held that government officials cannot use the "special needs" doctrine as a loophole to implement suspicionless searches for law enforcement purposes. 532 U.S. at 85. If the rule in *Ferguson* applies to a challenged governmental action, then the "primary purpose" of the action as well as its "immediate objective" must be something other than the generation of evidence for criminal law enforcement purposes. *Id.* at 83.

If the present case is to be considered under the "special needs" rubric, the first issue to determine is whether *Ferguson's* "primary purpose"/"immediate objective" rule even applies. In coming to this rule, the *Ferguson* Court had to confront two cases upholding warrantless Fourth Amendment intrusions apparently undertaken in furtherance of criminal law enforcement. The first was *New York v. Burger*, 482 U.S. 691, 702 (1987), in which the Court upheld a system of warrantless searches of automobile junkyards, *by police*, pursuant to a statute calculated to further the state's interest in preventing car theft. In *Burger,* police were permitted to conduct warrantless searches of business records, vehicles and vehicle parts at businesses subject to the regulation. *Id.* at 694. A failure to keep or produce records or allow a search of vehicles and vehicle parts was a crime. *Id.* The Court concluded the warrantless searches were proper notwithstanding that their "ultimate purpose" was to deter criminal conduct, the administrative scheme itself was enforced by criminal sanctions, and police were involved in the scheme from top to bottom. *Id.* at 704.

The second case the *Ferguson* Court distinguished was *Griffin v. Wisconsin*, 483 U.S. 868 (1987). In *Griffin*, the Court evaluated a state probation regulation which permitted the nonconsensual, warrantless search of a probationer's home as long as there were "reasonable grounds" to believe the home contained contraband. *Id.* at 870-71. After determining the supervision of probationers was a "special

need[ ] beyond normal law enforcement", the Court held the special needs of the probation system justified the warrantless search. *Id.* at 880.

The *Ferguson* Court confronted this apparent inconsistency between the "primary purpose"/"immediate objective" rule it had just articulated and the dual purpose searches in *Griffin* and *Burger*. The Court dismissed the *Griffin* analysis because "*Griffin* is properly read as limited by the fact that probationers have a *lesser expectation of privacy than the public at large.*" *Ferguson*, 532 U.S. at 79 n. 15. (Emphasis added.) *Burger* was distinguished on similar grounds, i.e. "that case involved an industry in which the *expectation of privacy in commercial premises was 'particularly attenuated.'*" 532 U.S. at 83 n. 21. (Emphasis added.) Also, the Court emphasized that the "plain administrative purposes" of the *Burger* scheme demonstrated that it was not simply a ruse to gather criminal evidence. *Id.*

Finally, the Court had to confront those "seizure cases in which [the Court has] applied a balancing test to determine Fourth Amendment reasonableness." Those "seizure" cases included *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990) (justifying warrantless, suspicionless seizures of motorists at a checkpoint set up to intercept drunk drivers) and *United States v. Martinez-Fuerte*, 428 U.S. 543, 561-64 (1976) (upholding a warrantless, suspicionless border checkpoint set up to intercept narcotics and illegal aliens). According to the Court, those cases did not apply because they involved *seizures,* not "the

intrusive search of the body or home." *Ferguson*, 532 U.S. at 83 n. 21. So even though the Court engaged in a balancing of interests in *Martinez-Fuerte* and *Sitz*, the fact that they were merely "seizure" cases established that they were not eligible to inform the analysis of the suspicionless searches at issue in *Ferguson*. *Id.*

After distinguishing *Burger*, *Griffin*, *Martinez-Fuerte*, and *Sitz* as not *really* special needs cases, the Court was able to declare "[i]n none of our previous special needs cases have we upheld the collection of evidence for criminal law enforcement purposes." *Id.* at 83, n. 20. Given how selectively the *Ferguson* Court identified cases as "special needs cases" that much is true. Nevertheless, "special needs" labels aside, the fact of the matter is that *Burger*, *Griffin*, *Martinez-Fuerte*, and *Sitz* were each decided based upon "traditional standards of reasonableness," not a presumed requirement of a warrant or probable cause. Moreover, the seizure at issue in this case possesses at least two of the characteristics the *Ferguson* Court identified as justifications for balancing using "traditional standards of reasonableness" notwithstanding their identification as a "special need." First, this case *is a "seizure case,"* not a case involving "the intrusive search of the body or the home." Second, this case involves a child at a public school, part of a group of people who, as shown in Alford's merits brief, "*have a lesser expectation of privacy than the public at large.*" (Pet. Brief, pp. 49-53).

For these reasons, *Ferguson* simply does not apply here. The *Ferguson* rule can only be said to

apply to intrusive searches, conducted without a warrant or individualized suspicion under circumstances in which the person's expectation of privacy is the same as "the public at large." Here, S.G.'s interview was a seizure. An intrusive search of a home or a person's body is clearly not at issue. Further, the only people who could possibly be subjected to such a seizure under Oregon's statutory scheme – children – clearly do not have the same privacy interests as the "public at large." Thus, the Ninth Circuit's reliance on *Ferguson* was in error, and Respondents' arguments that the "special needs" doctrine does not apply to interviews of the type involved in this case are without merit.

B. There Was Not Excessive Law Enforcement Involvement in S.G.'s Interview.

The interview at issue in this case was undertaken pursuant to Oregon's child welfare statutes. These statutes reflect the measured response the State has taken in investigating and responding to the needs of its abused and neglected children. All governmental activities relative to such children are guided by the State's expressions of policy in Or. Rev. Stat. § 419B.010 (2001):[2]

---

[2] All citations to the Oregon Revised Statutes are to the 2001 versions, which were in effect in February 2003, when S.G.'s interview occurred. The same statement of policy is found in the current version of the statute, Or. Rev. Stat. § 419B.007.

> "The Legislative Assembly finds that for the purpose of facilitating the use of protective social services to prevent further abuse, safeguard and enhance the welfare of abused children, and preserve family life when consistent with the protection of the child by stabilizing the family and improving parental capacity, it is necessary and in the public interest to require mandatory reports and investigations of abuse of children and to encourage voluntary reports."

At the outset, unlike the policy involved in *Ferguson*, there is no mention of an intent to further criminal law enforcement purposes in the policy statement or, for that matter, anywhere else in the statutory scheme. The only punitive measures expressed in the scheme relate to a failure of a public official to report suspected child abuse when required, or the unlawful disclosure of confidential records. Or. Rev. Stat. § 419B.010(3); Or. Rev. Stat. § 419B.035(5).

Further, contrary to the Ninth Circuit's concerns, the statutes do not encourage "entanglement between law enforcement and social service workers." (App. to Pet. for Cert. at 35). Under Oregon law, an investigation into alleged child abuse begins when a report is made to either law enforcement or the Department of Human Services ("DHS"). Once a report is received, DHS must notify local law enforcement and vice versa. Or. Rev. Stat. § 419B.015. After cross-notification occurs, either DHS or the law enforcement agency must immediately investigate the "nature and cause of the abuse." Or. Rev. Stat. § 419B.020(1)(a). If such

an investigation concludes there is "reasonable cause" to believe abuse has occurred, the only result mandated by the scheme is protective. DHS must provide "protective social services" if necessary to protect the child from further abuse or to otherwise protect her welfare. Or. Rev. Stat. § 419B.020(2).

The governmental activity at issue here possesses none of the nine characteristics the *Ferguson* Court found indicative of an offensive "immediate [law enforcement] objective." Specifically:

1. The "initial and continuing focus" of the statutory scheme is the protection of the child, not anyone's arrest or prosecution. The duty to investigate and provide protective services exists regardless of whether a suspect can be identified or apprehended.

2. "Police operational guidelines" are not considered by Oregon's child welfare statutes or regulations.

3. There is no consideration given to the "range of possible criminal charges" or the "logistics of arrest." The administrative rules give barely a passing mention to the collection of evidence and say nothing about chain of custody. Or. Admin. Rule 413-020-0430(3)(A) (2002)[3]

---

[3] The 2002 regulations were the regulations in effect when the seizure occurred. The regulations underwent fairly substantial revision in 2003, but did not take effect until July of 2003.

(law enforcement "is responsible for collecting evidence to use in subsequent judicial proceedings").

4. The statutes and rules devote significant attention to the child's needs for protection and social services. For example, an abused or neglected child can be taken into protective custody, placed in shelter care, or released to a parent or other responsible person. Or. Rev. Stat. § 419B.175. If the child's needs include shelter care, civil protective proceedings are mandatory, as are "protective social services." Or. Rev. Stat. § 419B.185(1) and Or. Rev. Stat. § 419B.020(2). This scheme stands in contrast to the "treatment or jail" approach taken by the government in *Ferguson*. 532 U.S. at 72 (patient required to be arrested if she missed an appointment with a substance abuse counselor).

5. Law enforcement officials do not manage or direct the statute or its day-to-day administration.

6. Unlike *Ferguson*, concerns about the integrity of criminal evidence and other concerns unique to criminal prosecution are given a statutory back seat to the overarching interests in protecting children. Or. Rev. Stat. § 418.747(5) (In all child abuse investigations "[p]rotection of the child is of primary importance").

7. As in *Ferguson*, there is significant information sharing between law enforcement and child welfare officials. Unlike *Ferguson*, however, this exchange of information does not demonstrate it was gathered "for the specific purpose of incriminating" anyone. *Ferguson*, 532 U.S. at 85. Information is provided on an equal footing for law enforcement and non-law enforcement purposes. DHS may provide information respecting a child abuse investigation to the police, the child's physician, her attorney, a citizen review board reviewing children within the jurisdiction of the juvenile court, an abused child's court appointed special advocate, child care certification officials, and other entities as necessary to "investigate, prevent or treat child abuse and neglect, to protect children from child abuse and neglect" or research. Or. Rev. Stat. § 419B.035(1) & (2).

8. The "timing and circumstances of criminal arrests" are not relevant in Oregon's child welfare system. Indeed, there is no mention of them in the statutory scheme.

9. Finally, and perhaps most significantly, criminal prosecution of alleged offenders is *not* an essential ingredient in the success or failure of Oregon's system of child abuse investigation and response. Investigation and protection occur regardless

> of the outcome or existence of a criminal case.

To the extent *Ferguson's* "ultimate versus immediate" purpose inquiry is even required, the statutes and regulations demonstrate that the primary, ultimate, and immediate purpose of the seizures at issue here is to determine if the child has been abused and if she is in need of protection. Law enforcement interests, while significant, are always subordinate to the child's need for protection. *See* Or. Rev. Stat. § 418.747(5).

For these reasons, the Ninth Circuit clearly erred in finding that S.G.'s interview, and indeed the statutory scheme authorizing such interviews, evidence "excessive law enforcement involvement." Thus, as shown in Alford's merits brief, the "special needs" doctrine applies to interviews such as S.G.'s, and the ultimate question of whether the Fourth Amendment here requires a warrant, court order, exigent circumstances or parental consent must be determined by "balancing [the practice's] intrusion on the individual's Fourth Amendment interests against its promotion of legitimate government interests." *Vernonia School District 47J v. Acton*, 515 U.S. 646, 653 (1995). To the extent Respondents rely on *Ferguson* or the Ninth Circuit's opinion in their response to Alford's appeal, such reliance is without merit.

CONCLUSION

Relying on this Court's decision in *Ferguson v. City of Charlotte*, the Ninth Circuit rejected the District Court's ruling that the "reasonableness" standard announced in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) was applicable to the interview involved in this case. In doing so, the Ninth Circuit ruled not only that the "special needs" doctrine did not apply to the interview, but that because of the presence of Alford and what it felt was excessive law enforcement entanglement in the statutory scheme governing such interviews the interview itself was unreasonable under the Fourth Amendment. However, as shown both herein and in Alford's merits brief, neither is true. *Ferguson* is both factually and legally distinguishable from this case. When one applies the factors identified by the *Ferguson* Court as relevant to the determination of excessive involvement of law enforcement, the statutory scheme governing such interviews in Oregon is almost completely devoid of any of these factors. To the contrary, the scheme is clearly intended to detect abuse and identify whether the child is in need of protection. For these reasons, it is clear the Ninth Circuit's holding that the interview violated the Fourth Amendment is wrong, and it is equally clear Respondents' reliance on *Ferguson* is without merit. This Court should reverse the Ninth Circuit and conclude the interview was reasonable.

Additionally, as requested by Alford in his brief on the merits, the Court should announce a Fourth Amendment standard to govern such interviews

based on the framework created by the Court in *T.L.O.* This reasonableness standard embraces the Court's "touchstone" analysis under the Fourth Amendment, and is the most helpful decision of the Court. Alford submits that if an interview of this sort implicates the Fourth Amendment, a test akin to that announced in *T.L.O.* is the appropriate test to be used, not the Ninth Circuit's mechanical requirement for a warrant, court order, parental consent, or exigent circumstances.

Respectfully submitted,

CHRISTOPHER DENNIS BELL
Counsel of Record
Assistant Legal Counsel
STEVEN EDWARD GRIFFIN
Assistant Legal Counsel
OFFICE OF DESCHUTES COUNTY LEGAL COUNSEL
1300 NW Wall Street, Suite 205
Bend, OR 97701
541-388-6624
christopher_bell@co.deschutes.or.us
steven_griffin@co.deschutes.or.us

Attorneys for Petitioner
Deschutes County Deputy Sheriff James Alford

Supreme Court, U.S.
FILED
DEC 17 2010
OFFICE OF THE CLERK

11 9

Nos. 09-1454 and 09-1478

In the Supreme Court of the United States

BOB CAMRETA, PETITIONER

v.

SARAH GREENE, PERSONALLY AND AS NEXT FRIEND FOR S.G., A MINOR, AND K.G., A MINOR

JAMES ALFORD, DEPUTY SHERIFF, DESCHUTES COUNTY, OREGON, PETITIONER

v.

SARAH GREENE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
LANNY A. BREUER
Assistant Attorneys General
LEONDRA R. KRUGER
ROY W. MCLEESE III
Acting Deputy Solicitors General
ERIC J. FEIGIN
Assistant to the Solicitor General
THOMAS M. BONDY
SUSHMA SONI
JOHN M. PELLETTIERI
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

454d

(40)

QUESTIONS PRESENTED

The court of appeals in this case held that petitioners' interview of a suspected victim of parental abuse at her school violated the Fourth Amendment. It further held that petitioners were entitled to qualified immunity from damages in respondent's suit under 42 U.S.C. 1983 because the law governing such interviews was not clearly established. The questions presented are:

1. Whether judgment in petitioners' favor on qualified-immunity grounds precludes them from seeking review of the court of appeals' constitutional ruling.

2. Whether the Fourth Amendment requires a warrant, a court order, parental consent, or exigent circumstances before officials may interview a suspected victim of parental abuse at a public school.

TABLE OF CONTENTS

Page

Interest of the United States 1
Statement 2
Summary of argument 8
Argument:
I. The court of appeals' constitutional ruling is reviewable notwithstanding its ruling that petitioners are entitled to qualified immunity 11
A. Constitutional determinations in qualified-immunity cases impose prospective limitations on the actions of government officials 11
B. This Court has jurisdiction to review a constitutional determination that has continuing adverse consequences for a government official who prevailed on qualified-immunity grounds 14
II. The Fourth Amendment permits reasonable warrantless interviews at public schools of suspected victims of parental abuse 20
A. The law-enforcement-related interview of a suspect or witness does not presumptively require either a warrant or probable cause 21
B. Reasonable warrantless questioning of a suspected parental-abuse victim in a public school is consistent with the Fourth Amendment 26
Conclusion 34

TABLE OF AUTHORITIES

Cases: Page

Arizonans for Official English v. *Arizona*, 520 U.S. 43 (1997) 15

Bivens v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) 2, 11

Board of Educ. of Indep. Sch. Dist. No. 92 v. *Earls*, 536 U.S. 822 (2002) 28

Brigham City v. *Stuart*, 547 U.S. 398 (2006) 20

Brown v. *Texas*, 443 U.S. 47 (1979) 22, 26, 27

Bunting v. *Mellen*, 541 U.S. 1019 (2004) 12, 13, 15, 17, 19, 20

Calabretta v. *Floyd*, 189 F.3d 808 (9th Cir. 1999) 7

City of L.A. v. *Lyons*, 461 U.S. 95 (1983) 19

County of Sacramento v. *Lewis*, 523 U.S. 833 (1998) 12, 13

Deposit Guar. Nat'l Bank v. *Roper*, 445 U.S. 326 (1980) 15, 16, 17

District of Columbia v. *Heller*, 128 S. Ct. 2783 (2008) ... 18

Dunaway v. *New York*, 442 U.S. 200 (1979) 27

Electrical Fittings Corp. v. *Thomas & Betts Co.*, 307 U.S. 241 (1939) 16

Florida v. *Bostick*, 501 U.S. 429 (1990) 31

Florida v. *Rodriguez*, 469 U.S. 1 (1984) 22

Florida v. *Royer*, 460 U.S. 491 (1983) 27

Friends of the Earth, Inc. v. *Laidlaw Env'l Servs. (TOC), Inc.*, 528 U.S. 167 (2000) 17

Globe Newspaper Co. v. *Superior Ct.*, 457 U.S. 596 (1982) 27

Cases—Continued: Page

Griffin v. *Wisconsin*, 483 U.S. 868 (1987) 7, 25
Groh v. *Ramirez*, 540 U.S. 551 (2004) 24
Harlow v. *Fitzgerald*, 457 U.S. 800 (1982) 11
INS v. *Delgado*, 466 U.S. 210 (1984) 22, 31
Illinois v. *Lidster*, 540 U.S. 419 (2004) 23, 24, 26, 27, 28
Illinois v. *McArthur*, 531 U.S. 326 (2001) 21, 22, 24, 31
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 18
Michigan v. *Fisher*, 130 S. Ct. 546 (2009) 20
Michigan v. *Summers*, 452 U.S. 692 (1981) 23, 33
New Jersey v. *T.L.O.*, 469 U.S. 325 (1985) 7, 25
New York v. *Ferber*, 458 U.S. 747 (1982) 27
North Carolina v. *Alford*, 400 U.S. 25 (1970) 5
Pacific Bell Tel. Co. v. *LinkLine Comm'cns, Inc.*,
129 S. Ct. 1109 (2009) 18
Payton v. *New York*, 445 U.S. 573 (1980) 22
Pearson v. *Callahan*, 129 S. Ct. 808
(2009) 6, 9, 11, 12, 13, 14
Pennsylvania v. *Mimms*, 434 U.S. 106 (1977) 23
Pennsylvania v. *Ritchie*, 480 U.S. 39 (1987) 29
Samson v. *California*, 547 U.S. 843 (2006) 26
Saucier v. *Katz*, 533 U.S. 194 (2001) 12
Steagald v. *United States*, 451 U.S. 204 (1981) 22
Terry v. *Ohio*, 392 U.S. 1 (1968) 6, 20, 23, 28, 33
United States v. *Brignoni-Ponce*, 422 U.S. 873 (1975) ... 23
United States v. *Drayton*, 536 U.S. 194 (2002) ... 21, 22, 32
United States v. *Hensley*, 469 U.S. 221 (1985) 23
United States v. *Knights*, 534 U.S. 112 (2001) 25, 26

Cases: Continued: Page

United States v. *Montoya de Hernandez*, 473 U.S. 531 (1985) 23, 27, 33
United States v. *Place*, 462 U.S. 696 (1983) 23, 28
United States v. *Sharpe*, 470 U.S. 675 (1985) 23
United States v. *United States Dist. Ct.*, 407 U.S. 297 (1972) 24
United States v. *Watson*, 423 U.S. 411 (1976) 22
Vernonia Sch. Dist. 47J v. *Acton*, 515 U.S. 646 (1995) 25, 28, 31
Wilson v. *Layne*, 526 U.S. 603 (1999) 12, 13

Constitution, statutes and regulations:

U.S. Const.:
Art. III 9, 15, 16, 17, 19
Amend. IV ..... *passim*
Child Abuse Prevention and Treatment Act, 42 U.S.C. 5101 *et seq* 2
Child Abuse, Domestic Violence, Adoption and Family Services Act of 1992, Pub. L. No. 102 295, § 102(a), 106 Stat. 189 28
18 U.S.C. 1153 2
18 U.S.C. 2241(c) 2
18 U.S.C. 2243 2
25 U.S.C. 3206(a) 2, 14
25 U.S.C. 3206(b) 2
25 U.S.C. 3206(d) 2
28 U.S.C. 1254(1) 9, 15
28 U.S.C. 2106 ..... 9, 15

Statute and regulations—Continued: Page

42 U.S.C. 1983 ..... 1, 11
45 C.F.R. 1340.1-1340.20 2

Miscellaneous:

Sherry Bohannon et al., CAMI Program, Or. Dep't of Justice, *Oregon Interviewing Guidelines* (2d ed. 2004), http://www.doj.state.or.us/crimev/pdf/orinterviewingguide.pdf 32

Child Abuse and Neglect: Hearing Before the Senate Select Comm. on Indian Affairs, 100th Cong., 2d Sess. (1988) 30

Children's Bureau, U.S. Dep't of Health and Human Servs., *Child Maltreatment 2008*, http://www.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf 30

Jill Goldman et al., Office on Child Abuse & Neglect, U.S. Dep't of Health and Human Servs., *A Coordinated Response to Child Abuse and Neglect: The Foundation for Practice*, http://www.childwelfare.gov/pubs/usermanuals/foundation/foundation.pdf 28

Harborview Ctr. for Sexual Assault and Traumatic Stress & Wash. State Crim. Justice Training Comm'n, *Child Interview Guide* (2006), http://centerforchildwelfare.fmhi.usf.edu/kb/trpi/Child%20Interview%20Guide.pdf 33

Mark Hardin, *Legal Barriers in Child Abuse Investigations: State Powers and Individual Rights*, 63 Wash. L. Rev. 519 (1988) 29

5 Wayne R. LaFave, *Search and Seizure* (4th ed. 2004) 29

Miscellaneous—Continued: Page

National Ctr. for Prosecution of Child Abuse, American Prosecutors Research Inst., *Investigation and Prosecution of Child Abuse* (3d ed. 2004) 29

S. Rep. No. 203, 101st Cong., 1st Sess. (1989) 14

Robert L. Stern et al., *Supreme Court Practice* (8th ed. 2002) 15

Frank E. Vandervort, *Videotaping Investigative Interviews of Children in Cases of Child Sexual Abuse: One Community's Approach*, 96 J. Crim. L. & Criminology 1353 (2006) 29

In the Supreme Court of the United States

No. 09-1454

BOB CAMRETA, PETITIONER

v.

SARAH GREENE, PERSONALLY AND AS NEXT FRIEND FOR S.G., A MINOR, AND K.G., A MINOR

No. 09-1478

JAMES ALFORD, DEPUTY SHERIFF, DESCHUTES COUNTY, OREGON, PETITIONER

v.

SARAH GREENE, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

This case raises questions about the Fourth Amendment standard applicable to an in-school interview of a suspected victim of parental sexual abuse, as well as the reviewability of a court of appeals' constitutional ruling in an action brought pursuant to 42 U.S.C. 1983 when the court ultimately enters judgment in favor of the de-

fendants on the basis of qualified immunity. The United States has a substantial interest in this Court's resolution of both questions. The United States investigates and prosecutes crimes involving the abuse and exploitation of children, including child-abuse crimes that occur in the special maritime and territorial jurisdiction of the United States, 18 U.S.C. 2241(c), 2243, and in Indian country, 18 U.S.C. 1153. Federal law expressly authorizes warrantless interviews of children on Indian land without parental consent when there is "reason to believe the child has been subject to abuse." 25 U.S.C. 3206(a); see 25 U.S.C. 3206(b) and (d). The United States Department of Health and Human Services also funds and disseminates research related to child abuse and provides substantial funding to state child-abuse prevention and treatment programs, including funding for child-abuse investigations. See Child Abuse Prevention and Treatment Act, 42 U.S.C. 5101 *et seq.*; 45 C.F.R. 1340.1-1340.20. Finally, the principles governing the reviewability of constitutional rulings in Section 1983 actions against state and local officials will also apply in suits against federal officials pursuant to *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

STATEMENT

1. a. On February 12, 2003, police arrested respondent's husband, Nimrod Greene (Greene), on suspicion of sexually abusing F.S., a seven-year-old boy unrelated to him. Pet. App. 57.[1] According to F.S., Greene had touched F.S's penis over his jeans while drunk in F.S.'s

[1] Citations in this brief to the petition appendix refer to the appendix to the petition for a writ of certiorari in *Camreta* v. *Greene*, No. 09-1454.

home. *Id.* at 4. F.S. reported that this had happened once before. *Ibid.*

In the course of investigating these charges, the police received information from F.S.'s parents suggesting that Greene may have been sexually abusing his daughters, nine-year-old S.G. and five-year-old K.G. Pet. App. 4-5, 57-58. F.S.'s mother told officers that respondent, who is the girls' mother, "had talked to her about how she doesn't like the way [Greene] makes [S.G. and K.G.] sleep in his bed when he is intoxicated and she doesn't like the way he acts when they are sitting on his lap." *Id.* at 4-5. F.S.'s father told officers that Greene himself "has made some type of prior comment about how [respondent] was accusing him of molesting his daughters and [respondent] reportedly doesn't like the girls laying in bed with [Greene] when he has been drinking." *Id.* at 5. F.S.'s father denied that he or his wife had any direct knowledge of sexual abuse in the Greene home, but said that comments to that effect had "come in several ways" from respondent and Greene. *Ibid.*

The Oregon Department of Human Services (DHS) received a report of Greene's possible sexual abuse of his daughters approximately a week after Greene's arrest. Pet. App. 5. The following day, petitioner Bob Camreta, the child protective services caseworker assigned to assess the safety of S.G. and K.G., learned that Greene had been released from jail and was having unsupervised contact with his daughters. *Id.* at 57-58. "Based on his training and experience as a DHS caseworker, Camreta was aware that child sex offenders often act on impulse and often direct those impulses against their own children, among others. For this reason, he was concerned about the safety and well-being of

Nimrod Greene's own small children." *Id.* at 5 (internal quotation marks and brackets omitted).

b. Three days later, Camreta visited S.G.'s elementary school to interview her about the possible sexual abuse. Pet. App. 58. "Camreta thought the school would be a good place for the interview because it is a place where children feel safe and would allow him 'to conduct the interview away from the potential influence of suspects, including parents.'" *Id.* at 5-6. In-school interviews of this sort, Camreta explained, "are a regular part of child protective services practice and are consistent with DHS rules and training." *Id.* at 6 (brackets omitted). Camreta was accompanied by a county deputy sheriff, petitioner James Alford, who wore a visible firearm. *Ibid.* Camreta did not obtain parental consent, a warrant, or other court order before the interview. *Ibid.*

A school counselor retrieved S.G. from her classroom, told her that someone was there to talk with her, and took her to a private office where petitioners were waiting. Pet. App. 6. According to respondent, S.G. stated afterwards that she was scared when the school counselor left the room, but she did not ask to have the school counselor or her parents present, did not cry, and did not ask to call home. *Id.* at 8, 62. Respondent maintains that Camreta questioned S.G. for approximately two hours, although petitioners maintain that the interview lasted only about an hour. *Id.* at 6 & n.1. Alford did not ask any questions. *Id.* at 6. "With respect to Alford's presence, S.G. stated that she is generally comfortable around police officers, that Alford was nice to her and did not do anything to scare her, and that she trusted him." *Id.* at 8.

According to Camreta, S.G. told him that Greene had been touching her private parts (specifically, her chest

and buttock areas on the outside of her clothing) since she was three; that the incidents would occur after Greene had been drinking; that the last incident took place "just last week," during which she tried to tell Greene to stop; that she would go to her room and lock her door when Greene tried to touch her; and that respondent knew about the touching, which was one of their secrets "with her little sister, K.G." Pet. App. 6-7. S.G. and respondent claim that any such statements were the result of confusion or involuntary acquiesence following repeated questioning. *Id.* at 7-8. Camreta maintains that he did not coerce or try to induce accusatory responses. *Id.* at 7.

c. Greene was indicted on six counts of felony sexual assault against F.S. and S.G. Pet. App. 9. S.G. and K.G. were removed from the Greene home for approximately three weeks. *Id.* at 12. They received a physical examination at a medical center specializing in child sexual abuse, but the examiners were unable to determine whether they had been sexually abused. *Id.* at 12-13. At the time of the examination, S.G. recanted the statements she had made during her initial in-school interview with Camreta. *Id.* at 12. DHS remained concerned about the children's welfare, but consented to their return to respondent's custody. *Id.* at 13.

Greene's trial on the sexual-assault charges ended in a hung jury. Pet. App. 13. Though he maintained his innocence, he ultimately entered an *Alford* plea to the alleged abuse of F.S. *Id.* at 13 & n.1; see *North Carolina* v. *Alford*, 400 U.S. 25 (1970). The charges involving S.G. were dismissed. Pet. App. 13.

2. Respondent filed suit under 42 U.S.C. 1983 on behalf of herself, S.G., and K.G., against petitioners and others. Pet. App. 13-14 & n.4. Respondent alleged,

among other things, that petitioners' in-school interview of S.G. had violated the Fourth Amendment. *Id.* at 13-14.

The district court granted summary judgment for petitioners. Pet. App. 57. On the Fourth Amendment claim, the district court concluded that the evidence supported a finding that S.G. was seized for Fourth Amendment purposes, but that no constitutional violation occurred because the seizure was "objectively reasonable." *Id.* at 62-64. Applying the framework set forth in *Terry* v. *Ohio*, 392 U.S. 1 (1968), the court concluded that the interview was "justified at its inception" because petitioners had reasonable suspicion that Greene had abused or was a threat to abuse his children, and that the interview was "reasonably related in scope" to its permissible purpose of investigating that suspicion. Pet. App. 63-64 (quoting *Terry*, 392 U.S. at 20). The district court alternatively held that even if a constitutional violation had occurred, petitioners were entitled to qualified immunity from damages because a reasonable official in their position could have believed the interview to be lawful. *Id.* at 64-65.

3. The court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1-54. As relevant here, it concluded that the interview of S.G. did violate the Fourth Amendment, but that petitioners were entitled to qualified immunity because the constitutional violation was not clearly established under existing law. *Id.* at 16-44. The court acknowledged that it did not need to address the primary constitutional question, and could instead address only qualified immunity, but believed that addressing both would provide useful guidance. *Id.* at 16-18 (citing, *inter alia*, *Pearson* v. *Callahan*, 129 S. Ct. 808, 818 (2009)).

As an initial matter, the court of appeals agreed with the district court that a seizure had taken place, noting that petitioners did not dispute the issue. Pet. App. 18-19. The court then relied on its prior decision in *Calabretta* v. *Floyd*, 189 F.3d 808 (9th Cir. 1999), which concerned the warrantless entry of a home to investigate suspected child abuse, to hold that "the general law of search warrants applie[s] to child abuse investigations" outside, as well as inside, the home. Pet. App. 36 (quoting *Calabretta*, 189 F.3d at 814). An interview like the one in this case, the court concluded, requires a warrant or an equivalent court order supported by probable cause, except in cases presenting exigent circumstances or where officials are able to obtain parental consent. *Id.* at 36-37 & nn.17-19.

The court of appeals declined to apply the *Terry* framework to the warrantless in-school interview of S.G. Pet. App. 21. The court concluded, in particular, that this Court's decision in *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985), applying *Terry*'s "reasonableness" standard to a school official's warrantless search of a student's purse, see *id.* at 328, 341-342, was inapposite because S.G. was not seized or interviewed by school officials for the purpose of maintaining discipline and preserving authority at the school. Pet. App. 20-23. The court reasoned that *T.L.O.* fell within "a line of cases in which the Supreme Court has lowered traditional Fourth Amendment protections 'when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable,'" and concluded that law enforcement purposes and personnel were too deeply intertwined with S.G.'s seizure to justify applying the special-needs doctrine here. *Id.* at 26-34 (quoting *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987)).

Although the court of appeals determined that there was a constitutional violation, it held that petitioners were entitled to qualified immunity from damages because the constitutional right at issue was not clearly established. Pet. App. 38-44. The court observed that "other circuits have applied the 'special needs' reasonableness standard to investigations of child abuse," *id.* at 39, and determined that petitioners' actions were not clearly unconstitutional under that standard, *id.* at 44. The court stated, however, that "government officials investigating allegations of child abuse should cease operating on the assumption that a 'special need' automatically justifies dispensing with traditional Fourth Amendment protections in this context." *Id.* at 43.

SUMMARY OF ARGUMENT

The court of appeals erred in creating an inflexible prerequisite to the interview of a suspected victim of parental abuse at a public school. It required no less than a warrant (or similar court order), parental consent, or exigent circumstances. That requirement finds no support in this Court's cases, and threatens to eliminate an essential tool for the detection and prevention of child abuse and other child-exploitation crimes. This Court can and should vacate that portion of the court of appeals' opinion and remand for further proceedings.

A. The Court has jurisdiction to review the court of appeals' constitutional ruling even though petitioners successfully asserted a qualified-immunity defense in this suit. Constitutional rulings in qualified-immunity cases are a special class of determinations that by design have adverse prospective effects on prevailing defendants, the governmental agencies that employ them, and other governmental entities. Though petitioners

avoided liability in this case, the court of appeals' opinion places petitioners, along with other similarly situated officials, on injunction-like notice that they will be personally liable for damages unless they comply with the court of appeals' decision. To categorically foreclose further review in such circumstances would not only impose an unwarranted hardship on government officials and entities, but would also impede one of the primary purposes served by the court of appeals' initial consideration of the constitutional question, namely, the "development of constitutional precedent." *Pearson* v. *Callahan*, 129 S. Ct. 808, 818 (2009).

Although, as a matter of practice, this Court generally declines to entertain requests to review cases in which the petitioning party prevailed, there is no legal impediment to further review in this case. The Court has statutory authority to review a court of appeals' decision on the petition of "any party," and to grant broad relief, including vacating a lower-court decree and directing any necessary further proceedings. 28 U.S.C. 1254(1); see 28 U.S.C. 2106. There is no Article III bar to exercising that authority on behalf of a prevailing party where the prevailing party is aggrieved by the decision below. Petitioners in this case have standing to challenge the court of appeals' constitutional ruling because it effectively prohibits them from job-related activities in which they would otherwise engage. This Court's review of that ruling is warranted.

B. The court of appeals' constitutional ruling is incorrect. When investigative questioning involves a seizure, and thereby implicates the Fourth Amendment, the Court has consistently evaluated the constitutionality of the seizure under a context-specific reasonableness standard. Applying that standard, the interview of

a child in a public school based on reasonable suspicion of parental abuse complies with the Fourth Amendment, so long as the interview is otherwise conducted in a reasonable manner.

Neither a warrant nor probable cause is a necessary precondition to the reasonableness of an official interview. Instead, reasonableness is assessed by balancing the governmental interests served by the interview, and the degree to which the interview advances those interests, against the liberty intrusion it occasions. Child-abuse interviews in schools serve the significant interests of protecting children, assuring that they are in a condition to attend and benefit from school, and enforcing important criminal laws. The interviews advance those interests because they are often an indispensable component of child-abuse investigations: since child abuse happens behind closed doors with the child as the primary (or only) witness, investigators will often lack probable cause before interviewing the child; and when the suspected perpetrator is a parent, it often may be impractical or undesirable to seek or obtain parental consent to an interview. Finally, the interviews are at most a minor intrusion on the liberty of a child whose freedom of movement is already considerably restricted by virtue of her presence at school. Accordingly, so long as the interview itself is carried out in a reasonable manner—an issue that the court of appeals did not reach with respect to the interview at issue in this case—it is constitutional.

ARGUMENT

I. THE COURT OF APPEALS' CONSTITUTIONAL RULING IS REVIEWABLE NOTWITHSTANDING ITS RULING THAT PETITIONERS ARE ENTITLED TO QUALIFIED IMMUNITY

The court of appeals' entry of judgment in favor of petitioners on qualified-immunity grounds does not divest this Court of authority to review the court of appeals' constitutional determination. Though the qualified-immunity holding protected petitioners from damages liability in this particular instance, the constitutional ruling has both the purpose and the effect of prohibiting similar conduct by petitioners and others in the future. Review of such rulings is appropriate as both a jurisdictional and a practical matter.

A. Constitutional Determinations In Qualified-Immunity Cases Impose Prospective Limitations On The Actions Of Government Officials

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson* v. *Callahan*, 129 S. Ct. 808, 815 (2009) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982)). A state or federal official sued in his personal capacity under Section 1983 or *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for an alleged constitutional violation is accordingly entitled to the entry of judgment in his favor if either (1) his actions did not in fact violate the Constitution, or (2) the state of the law at the time would not have put him on notice that his actions vio-

lated the Constitution. *Wilson* v. *Layne*, 526 U.S. 603, 609 (1999).

Until recently, courts addressing motions for judgment on qualified immunity grounds were required to employ a two-step protocol under which they would decide whether a constitutional right was violated before deciding whether any such right was clearly established. *Saucier* v. *Katz*, 533 U.S. 194, 201 (2001). In *Pearson*, this Court relaxed that requirement, giving courts discretion to decide the latter issue without deciding the former. 129 S. Ct. at 818. The Court made clear, however, that it is "often beneficial" to decide the constitutional-violation question first. *Ibid.*; see *id.* at 821 (observing that this procedure is "often, but not always, advantageous").

As the Court explained in *Pearson*, a primary reason for a court to make such an announcement is to "promote[] the development of constitutional precedent." 129 S. Ct. at 818. At least in some cases, clarifying the constitutional rule will provide useful future guidance for government officials and the public at large. See *County of Sacramento* v. *Lewis*, 523 U.S. 833, 841 n.5 (1998) ("[I]f the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled constitutional rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals.").

Underlying this "development of constitutional precedent" rationale is the premise that a plaintiff-favorable constitutional rule announced by a court of appeals in the course of entering judgment in favor of the official defendant will bind future courts. See *Bunting* v. *Mellen*, 541 U.S. 1019, 1024 (Scalia, J., dissenting

from denial of certiorari) ("The [two step] procedure *gives* rise to—*and is designed to give rise to*—constitutional rulings * * * with precedential effect."). If that were not the case, then the announcement would be pointless, as the same official could engage in the same conduct again and credibly claim that the illegality of his actions *still* was not clearly established. See *id.* at 1023-1024. These announcements are therefore meant to put not only the particular defendant official, but also all other similarly situated officials within the court of appeals' jurisdiction, on notice that they will henceforth face individual damages liability for engaging in certain conduct. See *Wilson*, 526 U.S. at 609 ("Deciding the constitutional question before addressing the qualified immunity question * * * promotes clarity in the legal standards for official conduct."); *Lewis*, 523 U.S. at 841 n.5. A court of appeals' constitutional determination in a case like this thus has an effect similar to an injunction or a declaratory judgment against the government as a whole. Cf. *Pearson*, 129 S. Ct. at 820 (observing that "constitutional decisions" like this "may have a serious prospective effect" on the "operations" of "affected parties").

The court of appeals in this case chose to follow the two step *Saucier* protocol in order "to provide guidance to those charged with the difficult task of protecting child welfare." Pet. App. 18. The result was a ruling that the questioning of a suspected child-abuse victim "in the absence of a warrant, a court order, exigent circumstances, or parental consent [is] unconstitutional," *id.* at 36-37 (footnotes omitted), and an instruction to "government officials investigating allegations of child abuse" that they "should cease operating on the assumption that a 'special need' automatically justifies dispens-

ing with traditional Fourth Amendment protections in this context," *id.* at 43. That holding affects not only petitioners, but other state, local, and federal officials engaged in similar practices. It also casts doubt on federal law that expressly permits interviews of suspected child-abuse victims based on less than probable cause, and in the absence of parental consent. See 25 U.S.C. 3206(a) ("[I]nterviews of an Indian child alleged to have been subject to abuse in Indian country shall be allowed without parental consent if local child protective services or local law enforcement officials have reason to believe the child has been subject to abuse."); see S. Rep. No. 203, 101st Cong., 1st Sess. 3 (1989). Barring further review by this Court, officials within the court of appeals' jurisdiction now have the "unenviable choice" to "comply with the lower court's" opinion, or else to "defy the views of the lower court, adhere to practices that have been declared illegal, and thus invite new suits and potential punitive damages." *Pearson*, 129 S. Ct. at 820 (internal quotation marks, citation, and brackets omitted).

B. This Court Has Jurisdiction To Review A Constitutional Determination That Has Continuing Adverse Consequences For A Government Official Who Prevailed On Qualified-Immunity Grounds

An appellate ruling declaring that government action violated the Constitution, and warning officials not to engage in such conduct in the future, would generally be subject to further review. There is neither a legal nor a practical reason why the court of appeals' constitutional ruling here should be immune from such review simply because petitioners ultimately avoided personal damages liability at the second step of the *Saucier* analysis.

1. By statute, Congress has given this Court authority to review decisions of the courts of appeals on the petition of a prevailing party. The relevant jurisdictional statute provides that "[c]ases in the courts of appeals may be reviewed by the Supreme Court * * * [b]y writ of certiorari granted upon the petition of *any* party to any civil or criminal case, before or after rendition of judgment or decree." 28 U.S.C. 1254(1) (emphasis added). "The literal language of the §1254(1) reference to 'any party' is broad enough to encompass the successful or prevailing party before the court of appeals." Robert L. Stern et al., *Supreme Court Practice* 79 (8th ed. 2002) (Stern & Gressman); see *Bunting*, 541 U.S. at 1023 (Scalia, J., dissenting from denial of certiorari). And the expansive appellate-remedy statute—which allows this Court, among other things, to "modify" or "vacate" a lower-court "decree," and to "require such further proceedings to be had as may be just under the circumstances," 28 U.S.C. 2106—gives the Court the power to grant the prevailing party whatever relief may be appropriate.

2. This Court has previously recognized that "[i]n an appropriate case, appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits," limited only by the constraints of Article III. *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 334 (1980); see *ibid.* (noting that the prevailing party must "retain[] a stake in the appeal satisfying the requirements of Art[icle] III"); *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64 (1997) ("The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.").

In *Electrical Fittings Corp.* v. *Thomas & Betts Co.*, 307 U.S. 241 (1939), this Court considered the reviewability of a district court judgment in favor of the defendants in a patent suit, where the district court had held that the plaintiffs' patent was valid, but that the defendants had not infringed it. *Id.* at 241-242. The defendants, though they had prevailed, "asserted a concern that their success in some unspecified future litigation would be impaired by stare decisis or collateral-estoppel application of the District Court's ruling on patent validity." *Deposit Guar. Nat'l Bank*, 445 U.S. at 337. The Court held that the defendants could ask the court of appeals to "entertain [an] appeal, not for the purpose of passing on the merits, but to direct the reformation of the decree" to eliminate the validity ruling. *Electrical Fittings*, 307 U.S. at 242. The Court "had the question of mootness before it, yet because policy considerations permitted an appeal from the District Court's final judgment and because petitioners alleged a stake in the outcome, the case was still live and dismissal was not required by Art[icle] III." *Deposit Guar. Nat'l Bank*, 445 U.S. at 335.

The constitutional ruling in this case is "collateral to the judgment" on qualified-immunity grounds in the same way that the patent-validity ruling in *Electrical Fittings* was "collateral to the judgment" on noninfringement grounds. *Deposit Guar. Nat'l Bank*, 445 U.S. at 334. And this case is similarly "still live" for purposes of Article III. *Id.* at 335. Indeed, the adverse consequences of the ruling here—which prevents petitioners from engaging in a "routine investigative technique," 09-1478 Pet. 14; 09-1454 Pet. 11—are substantially more certain and imminent than the concerns about "unspecified future litigation" asserted by the appellants in *Elec-*

trical Fittings. See *Deposit Guar. Nat'l Bank*, 445 U.S. at 337; cf. *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183-184 (2000) (recognizing standing to sue where plaintiffs refrained from certain activities based upon "reasonable concerns" of adverse consequences). Finally, to the extent that the reviewability decision in *Electrical Fittings* was based on "policy considerations" (*Deposit Guar. Nat'l Bank*, 445 U.S. at 335), the decision below—which concerns not the business dealings of private parties but the constitutionality of governmental activities—presents a considerably stronger case for appellate review. See *Bunting*, 541 U.S. at 1024 (Scalia, J., dissenting from denial of certiorari) ("It seems to me that [the qualified-immunity] situation is exactly what we had in mind when we said, in *Deposit Guaranty Nat. Bank*, that 'in an appropriate case' a petitioner may appeal an adverse collateral ruling despite having secured a favorable judgment.") (quoting 445 U.S. at 334; one set of brackets omitted).

That petitioners here, unlike the defendants in *Electrical Fittings*, seek an appellate opinion not only vacating part of the lower court's ruling, but also addressing its merits, is of little moment. The merits question simply bears on the *reason why* the requested appellate relief (vacatur of the adverse portion of the lower-court decision) would be granted, not on whether this Court has jurisdiction to grant that relief.

Nor, for Article III purposes, is it significant that the validity of the patent at issue in *Electrical Fittings* may have been of ongoing significance to the non-appealing parties, whereas this case concerns the constitutionality of a practice that may or may not be applied to S.G. again. The prospective impact of the court's decision on

the non-appealing parties played no role in the Court's decision in *Electrical Fittings*. And in any event, this Court has throughout its history heard and decided numerous cases in which the non-appealing party had little or no interest in defending the lower court's judgment. See, *e.g.*, *Pacific Bell Tel. Co.* v. *LinkLine Comm'cns, Inc.* 129 S. Ct. 1109, 1117 (2009) (refusing to dismiss the writ of certiorari for "'lack of adversarial presentation' by an interested party" where respondents asked for vacatur of the lower-court decision in their favor, and noting that "prudential concerns favor our answering the question presented"); *District of Columbia* v. *Heller*, 128 S. Ct. 2783, 2845 (2008) (Stevens, J., dissenting) (observing that "only one side appeared and presented arguments" in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)); see also, *e.g.*, Stern & Gressman 666 (describing cases in which "the Court invites [an] *amicus* to present an argument because for some reason no other counsel will be representing that side of the case"); *Pepper* v. *United States*, No. 09-6822 (argued Dec. 6, 2010) (amicus appointed in light of government's confession of error).[2] It makes little sense to conclude that there was a sufficient case or controversy below to allow the court of appeals to decide the constitutional question notwithstanding its ultimate determination that petitioners were entitled to qualified immunity, yet conclude that the constitutional ruling is unreviewable because that case or controversy is absent now.

---

[2] Notably, respondent in this case filed a brief in opposition to the petitions for a writ of certiorari in which she defended the court of appeals' constitutional ruling. See Br. in Opp. 7 ("The Court should deny the Petition for Writs of Certiorari because the Ninth Circuit has correctly stated the law.").

That is not to say that constitutional rulings by courts of appeals in qualified-immunity cases will always be reviewable. It may well be that an official defendant who has prevailed on qualified-immunity grounds will lack standing to seek further review because there is an insufficient likelihood that he will again engage in the practice that has been ruled unconstitutional. Cf. *City of L.A.* v. *Lyons*, 461 U.S. 95, 105-106 (1983). But where, as here, a court of appeals' constitutional ruling effectively prohibits the official defendants from performing an important and recurring job-related function, Article III permits an appeal.

3. In the absence of either a constitutional or a statutory bar, the only potential impediment to review in this case is this Court's traditional "practice" of declining "to entertain an appeal by a party on an issue as to which he prevailed." *Bunting*, 541 U.S. at 1023 (Scalia, J., dissenting from denial of certiorari). That "general rule," however, "should not apply where a favorable judgment on qualified-immunity grounds would deprive a party of an opportunity to appeal the unfavorable (and often more significant) constitutional determination." *Ibid.*

For reasons already explained, see pp. 12-14, *supra*, such constitutional determinations have the potential to inflict real and serious consequences upon governmental officials, the institutions that employ them, and other governmental agencies. Furthermore, petitions seeking review of such determinations are likely to reach this Court only if (1) the court of appeals deems it useful to decide a constitutional issue adversely to the official defendant despite granting qualified immunity, and (2) the issue is important and recurrent enough that the defendant perceives the need for further review despite

having won below. A categorical refusal to review such determinations not only would be "unfair to the litigant (and to the institution that the litigant represents)" but also would "undermine[] the purpose served by initial consideration of the constitutional question, which is to clarify constitutional rights without delay." *Bunting*, 541 U.S. at 1024 (Scalia, J., dissenting from denial of certiorari). This Court can and should review the court of appeals' Fourth Amendment ruling in this case.

II. THE FOURTH AMENDMENT PERMITS REASONABLE WARRANTLESS INTERVIEWS AT PUBLIC SCHOOLS OF SUSPECTED VICTIMS OF PARENTAL ABUSE

As this Court's cases make clear, "[t]he ultimate touchstone of the Fourth Amendment * * * is reasonableness," and the inquiry into what is reasonable "must be shaped by * * * context." *Michigan* v. *Fisher*, 130 S. Ct. 546, 548 (2009) (per curiam) (internal quotation marks omitted) (quoting *Brigham City* v. *Stuart*, 547 U.S. 398, 403 (2006)), *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968). The court of appeals in this case erred by reflexively importing a requirement of a warrant (or a traditional warrant exception) into a context—official questioning—where a warrant issued on probable cause generally has not been a prerequisite for reasonableness. Indeed, outside the context of an arrest (or its functional equivalent), the constitutionality of a seizure related to official questioning does not turn on the presence of probable cause at all, but instead depends on a balancing of the public and private interests involved. When justified by reasonable suspicion and conducted in a reasonable manner, the warrantless in-school interview of a suspected victim of parental abuse satisfies such a balancing test.

A. The Law-Enforcement-Related Interview Of A Suspect Or Witness Does Not Presumptively Require Either A Warrant Or Probable Cause

The Fourth Amendment, as interpreted by this Court, establishes various "rules and presumptions designed to control conduct of law enforcement officers that may significantly intrude upon privacy interests." *Illinois* v. *McArthur*, 531 U.S. 326, 330 (2001). "Sometimes those rules require warrants," but the Court has also found "that certain general, or individual, circumstances may render a warrantless search or seizure reasonable." *Ibid.* Official questioning, when it implicates the Fourth Amendment at all, has been one of the "general circumstances" in which a warrant, or a probable-cause-based warrant exception such as exigent circumstances, is not presumptively required. Official questioning often does not require probable cause, and sometimes does not even require individualized suspicion.

1. As an initial matter, official questioning, whether by the police or otherwise, frequently will not amount to a "seizure" under the Fourth Amendment. "Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search" the person's effects without implicating the Fourth Amendment. *United States* v. *Drayton*, 536 U.S. 194, 201 (2002). Such official conduct does not rise to the level of a seizure so long as "a reasonable person would feel free to terminate the encounter," and the Fourth Amendment accordingly imposes no threshold requirements before an officer may engage in that conduct. *Ibid.*

In this case, petitioners have not challenged the lower courts' determination that the interview of S.G. in-

volved a seizure.[3] See Pet. App. 18, 62. The determination that a seizure occurred, however, is the beginning, rather than the end, of the Fourth Amendment inquiry, which then requires an analysis of whether the seizure is reasonable. *E.g.*, *McArthur*, 531 U.S. at 331.

2. The degree of official justification necessary for an investigatory seizure depends upon the nature of the seizure. A small class of particularly invasive seizures—namely, arrests of suspects in a private place—require a warrant supported by probable cause. See *Steagald* v. *United States*, 451 U.S. 204, 205-206 (1981); *Payton* v. *New York*, 445 U.S. 573, 586 (1980). Most seizures, however, do not. Police officers may, for example, arrest a suspect in public without a warrant, so long as the arrest is supported by probable cause. *United States* v. *Watson*, 423 U.S. 411, 417-418 (1976).

For seizures less intrusive than an arrest—a category that includes most seizures related to official questioning—probable cause is not necessarily required. See *Brown* v. *Texas*, 443 U.S. 47, 50 (1979). Rather, the "reasonableness" of such seizures "depends 'on a bal-

---

[3] Even assuming that there was a seizure in this case, it is far from clear that all in-school child interviews would be seizures. So long as the child is asked to come to the interview voluntarily, and a reasonable person in the child's position would feel free to terminate the interview, no seizure has occurred. See, *e.g.*, *Florida* v. *Rodriguez*, 469 U.S. 1, 5-6 (1984) ("The initial contact between the officers and respondent, where they simply asked if [the suspect] would step aside and talk with them, was clearly the sort of consensual encounter that implicates no Fourth Amendment interest."); *Drayton*, 536 U.S. at 201. The fact that the child's freedom is otherwise restricted in the school environment does not by itself mean that the child is unable to terminate the interview. See *id.* at 203-206 (questioning of passengers on a bus not a seizure); *INS* v. *Delgado*, 466 U.S. 210, 218 (1984) (questioning of factory workers by agents blocking exits not a seizure); see also pp. 30-31, *infra*.

ance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" *Ibid.* (quoting *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109 (1977)). The Court's seminal opinion in *Terry*, for example, applied an interest-balancing approach to conclude that law enforcement officers may stop and question someone based upon reasonable suspicion that he is about to commit a crime. 392 U.S. at 8-22. The *Terry* reasoning has since been extended to permit reasonable-suspicion-based questioning in other contexts as well. See, *e.g.*, *United States* v. *Sharpe*, 470 U.S. 675, 682 (1985) (stop to investigate reasonable suspicion of ongoing criminal activity in vehicle); *United States* v. *Hensley*, 469 U.S. 221, 229 (1985) (stop to investigate reasonable suspicion of already-completed felony); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 881-884 (1975) (stop to investigate reasonable suspicion of alien-smuggling at border). An officer with reasonable suspicion to stop someone for questioning may detain him for the length of time reasonably necessary to confirm or alleviate the suspicion. *Michigan* v. *Summers*, 452 U.S. 692, 700 n.12 (1981); see *e.g.*, *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 542-544 (1985) (upholding multi-hour airport detention of suspected international drug smuggler); *Sharpe*, 470 U.S. at 687-688 (upholding 20-minute traffic stop); cf. *United States* v. *Place*, 462 U.S. 696, 709-710 (1983) ("[A]lthough we decline to adopt any outside limitation for a permissible *Terry* stop, we have never approved a seizure of the person for the prolonged 90-minute period involved here and cannot do so on the facts presented by this case.") (footnote omitted).

The Court's decision in *Illinois* v. *Lidster*, 540 U.S. 419 (2004), applied a similar balancing approach to per-

mit suspicionless seizures of potential witnesses to crimes. The Court in *Lidster* upheld the constitutionality of a checkpoint established for the purpose of asking motorists whether they had information about a fatal hit-and-run accident that had occurred around the same time roughly a week before. *Id.* at 421-422. The checkpoint stops, the Court held, were constitutional despite the absence of any sort of individualized suspicion that the stopped motorists would have any information about the event. *Id.* at 424-425. The Court recognized the importance of such "information-seeking stop[s]," even where accomplished by a seizure. *Id.* at 425-426.

3. In concluding that a formal warrant requirement applies to the questioning of a suspected child-abuse victim in a public school, the court of appeals misinterpreted this Court's precedents in two critical respects. First, the court of appeals relied on its precedent concerning the warrantless entry of a home, declining to distinguish for Fourth Amendment purposes between entry of a home and an interview at school. See, *e.g.*, Pet. App. 21. This Court, however, has recognized that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States* v. *United States Dist. Ct.*, 407 U.S. 297, 313 (1972). For that reason, "searches and seizures inside a home without a warrant are presumptively unreasonable." *Groh* v. *Ramirez*, 540 U.S. 551, 559 (2004) (citation omitted); see p. 22, *supra* (noting the application of a warrant requirement to in-home arrests). No similar reasoning, however, presumptively requires warrants for seizures that occur elsewhere. See, *e.g.*, *McArthur*, 531 U.S. at 336 ("Temporarily keeping a person from entering his home, a consequence whenever police stop a person on the street, is consider-

ably less intrusive than police entry into the home itself in order to make a warrantless arrest or conduct a search."). Indeed, the home-protection rationale is particularly inapplicable to a seizure at a public school. See *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 654 (1995) (distinguishing the privacy interests of an individual in his home from the interests of children who "have been committed to the temporary custody of the State as schoolmaster").

Second, the court of appeals erroneously believed that the "direct involvement of law enforcement" in a child-abuse investigation militates in favor of requiring a warrant or exigent circumstances justifying an exception to the warrant requirement. Pet. App. 36. The court reached that conclusion by negative inference from this Court's so-called "special needs" cases. *Id.* at 29. In those cases, the Court has addressed circumstances in which "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Griffin* v. *Wisconsin*, 483 U.S. 868, 873 (1987) (quoting *New Jersey* v. *T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in the judgment)). The court of appeals concluded that these special-needs cases dictate that when law enforcement is involved, "the general law of search warrants applies." Pet. App. 36 (brackets and citation omitted).

This Court has expressly rejected the "dubious logic" that its cases upholding special-needs searches and seizures can be read implicitly to *restrict* the scope of permissible law-enforcement practices. *United States* v. *Knights*, 534 U.S. 112, 117 (2001). The Court has explained that a search or seizure may be "otherwise reasonable within the meaning of the Fourth Amendment"

irrespective of whether it is deemed reasonable under a special-needs analysis. *Id.* at 117-118; see, *e.g.*, *Samson* v. *California*, 547 U.S. 843, 855 n.4 (2006) (suspicionless searches may be reasonable in both special-needs and non-special-needs cases). As the many law-enforcement cases cited above demonstrate, the mere fact that a case directly involves law enforcement personnel and objectives does not automatically trigger a warrant requirement. See pp. 21-24, *supra*. The court of appeals erred in concluding otherwise.

B. Reasonable Warrantless Questioning Of A Suspected Parental-Abuse Victim In A Public School Is Consistent With The Fourth Amendment

A seizure for the purposes of interviewing a suspected parental-abuse victim at a public school, like most questioning-related seizures, falls within the class of seizures "less intrusive than a traditional arrest" that do not necessarily require probable cause, and to which this Court applies a balancing test to determine reasonableness. *Brown*, 443 U.S. at 50. Whereas an arrest involves accusation and the serious threat of prolonged incarceration or other punishment, an interview with a suspected *victim* of child abuse does not.[4] Cf. *Lidster*, 540 U.S. at 425 (distinguishing information-seeking stops from interrogation of suspects). As discussed further below, the liberty restrictions in such an interview (to the extent they exist) arise primarily from the custodial aspects of public schooling, rather than the presence of law-enforcement officers. See pp. 30-31, *infra*. And

---

[4] Because S.G. was not herself suspected of committing a crime, this case provides no occasion to address the circumstances under which an in-school interview with a suspect would be reasonable.

so long as such interviews take place on school grounds, do not involve physical restraint, and do not involve the commandeering of personal property, they lack the indicia of a custodial arrest. Compare, *e.g.*, *Montoya de Hernandez*, 473 U.S. at 544 (prolonged detention of uncooperative suspect in private airport office not considered an arrest), with *Florida* v. *Royer*, 460 U.S. 491, 502-503 (1983) (plurality opinion) (functional arrest where police in airport seized ticket, identification, and luggage of suspect waiting to board plane and took him to private room for interrogation); *Dunaway* v. *New York*, 442 U.S. 200, 212 (1979) (functional arrest where suspect was taken to police station and would have been restrained had he tried to leave).

To assess the reasonableness of this type of seizure, this Court looks to "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Lidster*, 540 U.S. at 427 (quoting *Brown*, 443 U.S. at 51). Under that rubric, a warrantless interview at a public school of a child whom officials reasonably suspect to be a victim of parental abuse is constitutional, so long as the interview is conducted in a reasonable manner.

1. Multiple important "public concerns" are "served by" the interview of a suspected victim of parental abuse, particularly parental sexual abuse. To begin with, it is "evident beyond the need for elaboration" that the governmental "interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling,'" and that "prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." *New York* v. *Ferber*, 458 U.S. 747, 756-757 (1982) (quoting *Globe Newspaper Co.* v.

Superior Ct., 457 U.S. 596, 607 (1982)); see Child Abuse, Domestic Violence, Adoption and Family Services Act of 1992, Pub. L. No. 102-295, § 102(a), 106 Stat. 189 ("[S]ubstantial reductions in the prevalence and incidence of child abuse and neglect and the alleviation of its consequences are matters of the highest national priority."). There is also a related, but distinct, governmental interest in the public-schooling context in assuring that the influences a child is under (even if those influences arise off-campus) do not impede the ability of that child, or of other children, to participate in school activities. See *Board of Educ. of Indep. Sch. Dist. No. 92* v. *Earls*, 536 U.S. 822, 829-831 (2002) (recognizing a similar interest in relation to drug abuse); *Acton*, 515 U.S. at 661-662 (same); Jill Goldman et al., Office on Child Abuse & Neglect, U.S. Dep't of Health and Human Servs., *A Coordinated Response to Child Abuse and Neglect: The Foundation for Practice* 37 (2003) ("Research has consistently found that maltreatment increases the risk of lower academic achievement and problematic school performance."), http://www.childwelfare.gov/pubs/usermanuals/foundation/foundation.pdf.[5]

2. A seizure of the sort that has been presumed in this case "advances the public interest" to a significant degree. If officials were required to have probable cause (in support of either a warrant or an exigent-circumstances exception) to interview a suspected child-

---

[5] Even outside the particular contexts of child abuse and public school, the federal government and the states have a strong general interest in the detection, prevention, and prosecution of crime. See *Terry*, 392 U.S. at 22; see also *Lidster*, 540 U.S. at 427 ("grave" public concern in investigation of fatal hit-and-run accident); *Place*, 462 U.S. at 703 ("[T]he public has a compelling interest in detecting those who would traffic in deadly drugs for personal profit.") (citation omitted).

abuse victim, at least some child-abuse investigations could be completely stymied. See generally Arizona Amicus Merits Brief. "Because of a lack of physical or medical evidence in most cases, and because [child-sexual-abuse] offenses by their nature typically take place in private, often the statements of the child who is the alleged victim are critically important, and perhaps the only, evidence." Frank E. Vandervort, *Videotaping Investigative Interviews of Children in Cases of Child Sexual Abuse: One Community's Approach*, 96 J. Crim. L. & Criminology 1353, 1354 (2006) (footnote omitted); see *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 60 (1987) ("Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim."). It will therefore be difficult, if not impossible, in many cases to obtain probable cause *before* interviewing the child. See, *e.g.*, Mark Hardin, *Legal Barriers in Child Abuse Investigations: State Powers and Individual Rights*, 63 Wash. L. Rev. 493, 519 (1988); *id.* at 520 n.98; 5 Wayne R. LaFave, *Search and Seizure* § 10.3(a), at 105 (4th ed. 2004).

The court of appeals' recognition of an exception to the warrant requirement where the parent has consented to the questioning may help officers overcome those obstacles in some cases. But while there will surely be many cases in which parental consent can be sought and obtained, there will be other cases in which it cannot—for example, cases involving single-parent families or families where both parents are alleged to have participated in the abuse. And even in two-parent families where only one parent is suspected, the other parent may not be open to cooperating with investigators. National Ctr. for Prosecution of Child Abuse, American Prosecutors Research Inst., *Investigation*

and Prosecution of Child Abuse 94 (3d ed. 2004) (APRI) (in cases involving "an abusing and a nonabusing parent," the "nonabusing mother may protect the child" or "pressure the child not to talk about the abuse"); cf. Children's Bureau, U.S. Dep't of Health & Human Servs., *Child Maltreatment 2008*, at 7 (fig. 2-1), 70 (tbl. 5-3) (national study reporting that parents committed over 80% of cataloged instances of mistreatment, but made fewer than 7% of the cataloged reports of mistreatment), http://www.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf. Furthermore, even if there is a possibility that parental consent might be obtained, there is a risk that asking for it, and thereby making the investigation known, will give a parent (or others) a chance to thwart the investigation by pressuring the child. See, *e.g.*, APRI 94 (observing that non-abusing parent may "persuade the child to recant the disclosure so the perpetrator does not face the criminal justice system"); *Child Abuse and Neglect: Hearing Before the Senate Select Comm. on Indian Affairs*, 100th Cong., 2d Sess. 41 (1988) (testimony by U.S. Attorney that colleagues of a teacher accused of child abuse "beg[a]n to work on the victims so that we c[ould]n't get a good statement from them").

3. Particularly when balanced against the importance of investigating child abuse and the impossibility of doing so if probable cause or parental consent are required, the "severity of the interference with individual liberty" of a reasonable in-school interview is not great.

Since a schoolchild already is subject to the custodial authority of the public-school system, any liberty restriction imposed by the interview itself is, at most, minimal. A child at school, whether interviewed or not,

"lack[s] * * * the right of liberty in its narrow sense, *i.e.*, the right to come and go at will," because her parents' authority to "control" her "physical freedom" has been "delegated" to school authorities. *Acton*, 515 U.S. at 654-655. Those school authorities can restrict both the child's ability to leave school grounds and the child's ability to move about school grounds without permission. Though the interview may require the child (in order to *protect* her privacy) to go to a special room, the interview does nothing to change the preexisting restraints on the child's freedom that are imposed by the school. Those restraints, which are ancillary to the interview itself, do not factor into the Fourth Amendment calculus. Cf. *INS* v. *Delgado*, 466 U.S. 210, 218 (1984) ("Ordinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers."); *Florida* v. *Bostick*, 501 U.S. 429, 436 (1990) (observing that while bus passenger's movements "were 'confined' in a sense, * * * this was the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive"). Simply put, "Fourth Amendment rights * * * are different in public schools than elsewhere," and "the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." *Acton*, 515 U.S. at 656.

4. The reasonableness inquiry does, of course, require consideration not only of the degree of the seizure, but also of the manner in which it was conducted, including its length and other factors. See, *e.g.*, *McArthur*, 531 U.S. at 332. The court of appeals here, however, did not squarely address those issues in its constitutional analysis, instead deciding the Fourth Amendment ques-

tion based upon the application of a threshold warrant requirement. This Court need not decide in the first instance whether the interview in this case was conducted in a reasonable manner. To resolve this case, this Court need only hold that officials are not categorically barred from conducting in-school interviews of suspected child-abuse victims in the absence of a warrant (or equivalent court order), exigent circumstances, or parental consent.

To the extent the Court chooses to address the manner in which the interview was conducted, however, it bears mention that certain factors that appeared to concern the court of appeals in its qualified-immunity analysis—namely, the presence of an armed police officer, and the presumed two-hour length of the interview, see, *e.g.*, Pet. App. 40—did not necessarily render the interview unreasonable. As to the presence of the officer, this Court has observed that "[o]fficers are often required to wear uniforms and in many circumstances, this is cause for assurance, not discomfort," and that because it is "well known to the public" that officers are frequently armed, the "presence of a holstered firearm is * * * unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon." *Drayton*, 536 U.S. at 204-205; cf. Sherry Bohannan et al., CAMI Program, Or. Dep't of Justice, *Oregon Interviewing Guidelines* 43 (2d ed. 2004) (noting that while some children might be intimidated by a uniformed officer, others will be comforted), http://www.doj.state.or.us/crimev/pdf/orinterviewingguide.pdf; Pet. App. 8 (stating that S.G. said she was "generally comfortable around police officers," that Alford did not scare her, and that she "trusted him"). And as to the length of the encounter, the relevant requirement is simply that any seizure

be "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry*, 392 U.S. at 20. A child-abuse interview, particularly of a young child, may take much longer than a typical *Terry* stop, because the interviewer cannot necessarily put the questions to the child directly, and instead needs time to lay the ground rules (including possibly explaining the difference between telling the truth and lying), develop a rapport, and delve sensitively into the subject matter. See generally Harborview Ctr. for Sexual Assault and Traumatic Stress & Wash. State Crim. Justice Training Comm'n, *Child Interview Guide* (2006), http://centerforchildwelfare.fmhi.usf.edu/kb/trpi/Child%20Interview%20Guide.pdf. The fact that it may take some time to "verify or dispel" the reasonable suspicion that justifies child-abuse interviews does not make such interviews unreasonable. *Montoya de Hernandez*, 473 U.S. at 544; see, *e.g.*, *Summers*, 452 U.S. at 700 n.12.

CONCLUSION

This Court should vacate the judgment of the court of appeals on respondent's Fourth Amendment claim and remand the case with instructions to enter judgment for petitioners consistent with Fourth Amendment principles set forth by this Court.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
TONY WEST
LANNY A. BREUER
Assistant Attorneys General
LEONDRA R. KRUGER
ROY W. MCLEESE III
Acting Deputy Solicitors General
ERIC J. FEIGIN
Assistant to the Solicitor General
THOMAS M. BONDY
SUSHMA SONI
JOHN M. PELLETTIERI
Attorneys

DECEMBER 2010

Nos. 09-1454, 09-1478

In the Supreme Court of the United States

BOB CAMRETA, *Petitioner*,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor, *Respondents*.

JAMES ALFORD, Deputy Sheriff, Deschutes County, Oregon, *Petitioner*,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor, *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICI CURIAE* THE AMERICAN FAMILY RIGHTS ASSOCIATION, OREGON FAMILY RIGHTS, THE FAMILY ADVOCACY MOVEMENT, THE FAMILY LEGAL PROJECT OF NEBRASKA INC., THE HOME SCHOOL LEGAL DEFENSE ASSOCIATION, THE GEORGIA OFFICE OF FAMILY REPRESENTATION, THE U.D.C. DAVID A. CLARKE SCHOOL OF LAW LEGAL CLINIC, AND THE LEGAL ASSISTANCE FOUNDATION OF METROPOLITAN CHICAGO IN SUPPORT OF RESPONDENTS

CHRISTOPHER LANDAU, P.C.
Counsel of Record
MICHAEL A. GLICK
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com

January 31, 2011

TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 4

PETITIONERS' WARRANTLESS SEIZURE OF A MINOR CHILD WITHOUT PARENTAL CONSENT OR EXIGENT CIRCUMSTANCES VIOLATED THE FOURTH AMENDMENT. 4

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

Cases

Allison v. Roberts,
960 F.2d 481 (5th Cir. 1992) 11

Croft v. Westmoreland Cty. Children & Youth Servs.,
103 F.3d 1123 (3d Cir. 1997) 12

Darryl H. v. Coler,
801 F.2d 893 (7th Cir. 1986).....5

Davis v. Monroe County Bd. of Educ.,
526 U.S. 629 (1999).....6

Doe v. Heck,
327 F.3d 492 (7th Cir. 2003) 12

Graham v. Connor,
490 U.S. 386 (1989).....8

In re Carp,
340 F.3d 15 (1st Cir. 2003).....11

Ingraham v. Wright,
430 U.S. 651 (1977).....13

Meyer v. Nebraska,
262 U.S. 390 (1923).....7

Moe v. Dinkins,
669 F.2d 67 (2d Cir. 1982).....6

New Jersey v. T.L.O.,
469 U.S. 325 (1985).....5, 13

Ohio v. Akron Ctr. for Reproductive Health,
497 U.S. 502 (1990).....10

Parham v. J.R.,
442 U.S. 584 (1979).....6, 7, 10, 11

Pierce v. Society of Sisters,
268 U.S. 510 (1925).....7, 8

Planned Parenthood of Cent. Mo. v. Danforth,
428 U.S. 52 (1976) 6

Planned Parenthood of S.E. Pa. v. Casey,
505 U.S. 833 (1992).....10

Prince v. Massachusetts,
321 U.S. 158 (1944).....7, 8

Quilloin v. Walcott,
434 U.S. 246 (1978).....10

Rishworth v. Moss,
191 S.W. 843 (Tex. Civ. App. 1917)..... 7

Safford Unified Sch. Dist. v. Redding,
129 S. Ct. 2633 (2009) 5

Santosky v. Kramer,
455 U.S. 745 (1982).....7, 10

Sevigny v. Dicksey,
846 F.2d 953 (4th Cir. 1988) 12

Smith v. Organization of Foster Families for Equality & Reform,
431 U.S. 816 (1977).....6

Stanley v. Illinois,
405 U.S. 645 (1972).....10

Tenenbaum v. Williams,
193 F.3d 581 (2d Cir. 1999).....13

Tinker v. Des Moines Indep. Comm. Sch. Dist.,
393 U.S. 503 (1969).....5

Troxel v. Granville,
530 U.S. 57 (2000) 3, 7, 8, 10

United States v. Dege,
364 U.S. 51 (1960) 11

Wallis v. Spencer,
202 F.3d 1126 (9th Cir. 2000) 12

West Virginia State Bd. of Educ. v. Barnette,
319 U.S. 624 (1943).....5

Wisconsin v. Yoder,
406 U.S. 205 (1972).....7

Zoski v. Gaines,
260 N.W. 99 (Mich. 1935).....7

Constitution, Statutes, and Rules

18 U.S.C. § 922(x)(3)(A)(ii).....7

29 U.S.C. § 213(c)(1)(A).....7

Cal. Health & Safety Code § 7150.15 7

Colo. Rev. Stat. Ann. § 25-4-2103.....7

Tex. Health & Safety Code Ann. § 146.0125.....7

U.S. Const. amend. IV.....5

Other Authorities

Blackstone, William,
Commentaries 6, 11

Field, George W.,
The Legal Relations of Infants (1888).....6

Kent, James,
Commentaries on American Law 6, 11

Sankaran, Vivek S.,
Parens Patriae Run Amuck:

The Child Welfare System's Disregard for the Constitutional Rights of Nonoffending Parents, 82 Temp. L. Rev. 55 (2009).....11

Schouler, James,
A Treatise on the Law of Domestic Relations (3d ed. 1882).....6

Pursuant to this Court's Rule 37.2, *amici curiae* respectfully file this brief in support of respondents.*

INTEREST OF *AMICI CURIAE*

Amici are a collection of non-profit organizations and advocacy groups with a strong interest in parental and family rights.

The American Family Rights Association is an association of parents, grandparents, former foster and adopted children, licensed social workers, and medical professionals dedicated to assisting parents and children facing government interference into their private lives. Similarly, Oregon Family Rights is a non-profit organization committed to promoting the well-being and preservation of families in Oregon. Oregon Family Rights advocates for the rights of parents accused of child abuse.

The Family Advocacy Movement is a national collaboration of parents, grandparents, family advocates, and other professionals who are committed to reforming the child welfare system by emphasizing the value of families. The Family Advocacy Movement seeks due process for all families involved in child protection cases.

---

* Pursuant to this Court's Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief, and global consent letters evidencing such consent have been filed with the Clerk of this Court pursuant to this Court's Rule 37.3.

The Family Legal Project of Nebraska, Inc. is a non-profit organization whose mission is to bring attorneys, social workers, and volunteer advocates together in an integrated team to help families resolve legal disputes. Family Legal Project maintains a particular interest in the rules and regulations governing child protection, custody, and other issues concerning at-risk children.

The Home School Legal Defense Association (HSLDA) is a non-profit membership association of over 80,000 families formed to protect the rights of families to teach their children at home without interference from government officials. HSLDA's interest in child abuse investigations concerns parental consent rights over interrogations of their children. Given that requests to seize and interrogate home-schooled children are often made at the front door to the family home, HSLDA's families seek clarification of their consent rights.

The Georgia Office of Family Representation provides legal representation of parents in abuse and neglect cases, as well as social services and policy advocacy. The Office is dedicated to protecting and preserving the integrity of Georgia families against unreasonable state interference.

The University of the District Columbia David A. Clarke School of Law Legal Clinic represents the birth parents of children involved in the child abuse and neglect systems. In addition, the faculty overseeing this clinic have written, litigated, taught, and lectured extensively in the area of child abuse and neglect.

The Legal Assistance Foundation of Metropolitan Chicago (LAF) represents children, parents, foster

parents, and relatives who are involved with the Illinois state child welfare system. Through their Children's Law Project, LAF has worked for over thirty years to protect the due process rights of children and families in state and federal court. LAF seeks to keep children in safe, stable placements and to preserve family ties.

Amici and their members seek to ensure that parental rights are afforded proper deference when government officials interact with their children. In particular, *amici* urge this Court to make it clear that it is generally unreasonable for law enforcement officials to search or seize minor children without their parents' consent. Such a rule would safeguard the legitimate and constitutionally protected interests not only of the children, but also of their parents. Accordingly, *amici* hereby file this brief supporting respondent.

INTRODUCTION AND SUMMARY OF ARGUMENT

"[T]he liberty interest ... of parents in the care, custody, and control of their children ... is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion of O'Connor, J., joined by Rehnquist, C.J., and Ginsburg and Breyer, JJ.); *see also id.* at 77 (Souter, J., concurring in the judgment); *id.* at 80 (Thomas, J., concurring in the judgment); *id.* at 95 (Kennedy, J., dissenting). That liberty interest, which this Court's cases have rooted in the Due Process Clause of the Fourteenth Amendment, is highly relevant in assessing whether the search or seizure of a minor child is "reasonable" under the Fourth Amendment. Because the "care,

custody, and control" of minor children is presumptively entrusted to their parents, the warrantless search or seizure of such a child by law enforcement officials is presumptively unreasonable absent parental consent or exigent circumstances. That approach protects both a minor child's Fourth Amendment right to freedom from "unreasonable" searches and seizures and the parents' right to the "care, custody, and control" of their minor children.

Petitioners' challenges to the decision below ignore the critical importance of parental consent in assessing the Fourth Amendment "reasonableness" of a law enforcement official's search or seizure of a minor child. Because petitioners have not denied that (1) their two-hour questioning of S.G. at her school was a Fourth Amendment "seizure," *see* Pet. App. 18, (2) they had no warrant or functional equivalent authorizing that seizure, Pet. App. 6, and (3) there were no exigent circumstances compelling the seizure, Pet. App. 36-37 n.17, they were required to seek parental consent. Because it is undisputed that petitioners neither sought nor obtained such consent, *see* Pet. App. 6, the seizure violated the Fourth Amendment. Accordingly, if this Court reaches the merits, it should affirm the judgment.

ARGUMENT

PETITIONERS' WARRANTLESS SEIZURE OF A MINOR CHILD WITHOUT PARENTAL CONSENT OR EXIGENT CIRCUMSTANCES VIOLATED THE FOURTH AMENDMENT.

This case turns on the simple and straightforward proposition that, absent a warrant (or its functional equivalent) or exigent circumstances, law enforcement officials generally

may not search or seize minor children without their parents' consent. In our society, parents stand as a barrier between their minor children and the State. Except in narrow circumstances, it is unreasonable for law enforcement officials to breach that barrier by searching or seizing a minor child without a parent's consent.

The Fourth Amendment by its terms protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. There is no question that minor children are "people" within the meaning of this Amendment, as under other provisions of the Constitution. *See, e.g., Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633, 2639 (2009); *New Jersey v. T.L.O.*, 469 U.S. 325, 334-36 (1985); *see also Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 506-07 (1969); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943). The "secur[ity]" of minor children guaranteed by the Fourth Amendment is generally entrusted to their parents. Thus, when a child is searched or seized by law enforcement officials, it is impossible to assess the reasonableness of that search or seizure without considering "the closely related legitimate expectations of the parents or other caretakers, protected by the Fourteenth Amendment, that their familial relationship will not be subject to unwarranted state intrusion." *Darryl H. v. Coler*, 801 F.2d 893, 901 (7th Cir. 1986). The first question a judge should ask in assessing a case, like this one, involving the reasonableness of the search or seizure of a minor child is whether the parents' consent was sought—and if not, why not.

Minor children, after all, generally lack the capacity to make legally binding decisions on their own. *See, e.g., Parham v. J.R.*, 442 U.S. 584, 603 (1979) (acknowledging that "parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions"); *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816, 841 n.44 (1977) (parents have standing to raise their children's claims because "children usually lack the capacity" to make litigation decisions); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 672 (1999) (Kennedy, J., dissenting) ("The law recognizes that children—particularly young children—are not fully accountable for their actions because they lack the capacity to exercise mature judgment."). Indeed, "[f]or centuries it has been a canon of the common law that parents speak for their minor children." *Parham*, 442 U.S. at 621 (Stewart, J., concurring) (citing 1 William Blackstone, *Commentaries* *452-53; 2 James Kent, *Commentaries on American Law* *203-06; James Schouler, *A Treatise on the Law of Domestic Relations* 335-353 (3d ed. 1882); George W. Field, *The Legal Relations of Infants* 63-80 (1888)).

Indeed, parental consent requirements are ubiquitous in American law. *See, e.g., Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 102 (1976) (Stevens, J., concurring in part and dissenting in part) (noting that a minor "may not make an enforceable bargain," and "may not lawfully work or travel where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures" without parental consent); *Moe v. Dinkins*, 669 F.2d 67, 68 (2d Cir. 1982) (upholding state statute requiring minors to obtain consent of their

parents prior to marriage); *Zoski v. Gaines*, 260 N.W. 99, 102 (Mich. 1935) (applying traditional common-law rule that physicians are liable in tort for battery for operating on a minor child without parental consent); *Rishworth v. Moss*, 191 S.W. 843, 848 (Tex. Civ. App. 1916) (same); 29 U.S.C. § 213(c)(1)(A) (farm labor by minors requires parental consent); 18 U.S.C. § 922(x)(3)(A)(ii) (gun possession by minors requires parental consent); Cal. Health & Safety Code § 7150.15(a)(2) (organ donation by minors requires parental consent); Colo. Rev. Stat. Ann. § 25-4-2103 (tattooing of minors requires parental consent); Tex. Health & Safety Code Ann. § 146.0125 (body piercing of minors requires parental consent).

Reflecting these legal and cultural norms, this Court has long recognized a fundamental right of parents over the care, custody, and control of their minor children. *See, e.g.*, *Troxel*, 530 U.S. at 65 (plurality); *id.* at 77 (Souter, J., concurring in the judgment); *id.* at 80 (Thomas, J., concurring in judgment); *id.* at 95 (Kennedy, J., dissenting); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 400-01 (1923). To say that this right is deeply rooted in our society would be an understatement; it is a pillar of our society. Indeed, no less than "[t]he history and culture of Western civilization" underscore the "primary role of the parents in the upbringing of their children," which "is now established beyond debate as an enduring American tradition." *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *see also Parham*, 442 U.S. at 602 ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit

with broad parental authority over minor children."); *Prince*, 321 U.S. at 166 ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."). This Court has squarely rejected the notion that a minor child is a "mere creature of the State." *Pierce*, 268 U.S. at 535.

Although courts may not rely on substantive due process rights to circumvent specific constitutional provisions, *see, e.g.*, *Graham v. Connor*, 490 U.S. 386, 393-94 (1989), that does not mean that such rights are irrelevant in assessing the scope of such provisions. To the contrary, the Fourth Amendment's standard of "reasonableness" affirmatively invites consideration of other constitutional values. Petitioners thus err by attempting to justify the reasonableness of their seizure of nine-year-old S.G. without any consideration of the rights and interests of her parents—including her mother, respondent Sarah Greene, who has never even been *accused* of any wrongdoing.

A search or seizure that fails to respect the deeply rooted and constitutionally protected right of parents over the care, custody, and control of their minor children is presumptively unreasonable. Just as it is constitutionally unreasonable for the government to usurp a parent's decision whether grandparents may visit a minor child, *see Troxel*, 530 U.S. at 65-72 (plurality); *see also id.* at 80 (Thomas, J., concurring in the judgment), it is constitutionally unreasonable for the government to usurp a parent's decision

whether law enforcement officials may seize a minor child.

Petitioners do not appear to challenge these principles as a general matter. Rather, they argue that "[s]eeking parental consent is simply not a safe or viable option when the suspected abuser is a parent." Camreta Br. 27; *see also* Alford Br. 41 ("[W]here a parent may be the abuser, seeking consent from either parent could be detrimental to the child."); U.S. Br. 29 ("[W]hile there will surely be many cases in which parental consent can be sought and obtained, there will be other cases in which it cannot—for example, cases involving single-parent families or families where both parents are alleged to have participated in the abuse. And even in two-parent families where only one parent is suspected, the other parent may not be open to cooperating with investigators.").

These arguments are puzzling, because they overlook the availability of a warrant or other judicial process as an alternative to parental consent. Where law enforcement officials deem parental consent impractical or counterproductive, they are free to seek a warrant or its functional equivalent from a neutral magistrate to search or seize a minor child. *See* Pet. App. 37 n.19. Among the questions any such neutral magistrate likely would ask is why they have not sought parental consent; if they can provide justification, there is no reason to think that their efforts would be stymied.

In this regard, the procedures in place here mirror the procedures approved by this Court in the abortion context. In particular, this Court has approved parental consent requirements for minor

girls to have abortions, provided there is some judicial bypass mechanism. *See, e.g., Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 899 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.); *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 510-19 (1990). Needless to say, law enforcement officials' ability to bypass parental consent in appropriate circumstances refutes the generalized charge that a default parental consent requirement is impractical or counterproductive. Absent exigent circumstances, a law enforcement official may search or seize a minor child without first seeking parental consent only with the prior approval of a neutral magistrate.

The law presumes, after all, that a minor child's parents are fit, *see, e.g., Santosky*, 455 U.S. at 748, 760 & n.10; *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Stanley v. Illinois*, 405 U.S. 645, 658 (1972), and that fit parents will act in the best interests of their minor children, *see, e.g., Troxel*, 530 U.S. at 68-69 (plurality); *Parham*, 442 U.S. at 602. These presumptions are not overcome merely because law enforcement officials suspect one or both parents of wrongdoing. The possibility that some parents may act contrary to the best interests of their own minor children is "hardly a reason to discard wholesale those pages of human experience that teach that parents generally *do* act in the child's best interests." *Id.* at 602-03 (emphasis added); *see also id.* at 603 ("The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition.") (emphasis in original).

Indeed, it is conceded here that law enforcement officials did not suspect respondent Sarah Greene, S.G.'s mother, of abusing her children, or being complicit in any such abuse, but nonetheless failed to seek her consent before seizing her minor daughter at school. The Government's generalized assertion that "even in two-parent families where only one parent is suspected, the other parent may not be open to cooperating with investigators," U.S. Br. 29, provides no sound basis for discounting the rights of a non-suspected parent. Law enforcement officials may not simply presume that such a parent will disregard the "natural bonds of affection [that] lead parents to act in the best interests of their children," *Parham*, 442 U.S. at 602 (citing Blackstone, *Commentaries* at *447; Kent, *Commentaries* at *190), to protect a spouse suspected of wrongdoing, *see* Vivek S. Sankaran, *Parens Patriae Run Amuck: The Child Welfare System's Disregard for the Constitutional Rights of Nonoffending Parents*, 82 Temp. L. Rev. 55, 86 (2009).

Petitioners' suspicions of Sarah Greene's husband thus provide no reason to suppose that she would not act in the best interests of her daughter. *See In re Carp*, 340 F.3d 15, 26 (1st Cir. 2003) ("The sins of the husband are not automatically visited upon the wife."); *Allison v. Roberts*, 960 F.2d 481, 485-86 (5th Cir. 1992) (refusing to impute a husband's fraudulent conduct to wife where there was "no evidence in the record linking [the wife] to false or fraudulent acts or plans," and where no agency relationship was established); *see also United States v. Dege*, 364 U.S. 51, 54 (1960) (rejecting the "medieval view that husband and wife are esteemed but as one Person in Law, and are presumed to have

but one Will" as a "blind imitation of the past") (internal quotation and citation omitted).

Thus, when it comes to seizing minor children, law enforcement officials cannot—in the absence of exigent circumstances—pursue an "act first, consult the parents later" approach. *See Doe v. Heck*, 327 F.3d 492, 524 (7th Cir. 2003) ("[B]ecause the defendants had no evidence giving rise to a reasonable suspicion that the plaintiff parents were abusing their children, or that they were complicit in any such abuse, the defendants violated the plaintiffs' right to familial relations by conducting a custodial interview of [a minor child] without notifying or obtaining the consent of his parents and by targeting the plaintiff parents as child abusers."); *see also Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000) ("[T]he police cannot seize children suspected of being abused or neglected unless reasonable avenues of investigation are first pursued, particularly where it is not clear that a crime has been—or will be—committed."); *cf. Croft v. Westmoreland Cty. Children & Youth Servs.*, 103 F.3d 1123, 1127 (3d Cir. 1997) (child protective agent violated father's rights by ordering him to leave his family without any basis to conclude that child had been abused or was in imminent danger of abuse); *Sevigny v. Dicksey*, 846 F.2d 953, 957-58 (4th Cir. 1988) (police officer violated mother's rights by arresting her on child abuse grounds without any investigation into the facts). This Court should make it clear that parental consent is the rule, not the exception, in assessing the Fourth Amendment reasonableness of a law enforcement official's search or seizure of a minor child.

It is worth noting, finally, that parents do not delegate their authority to consent to a law enforcement official's search or seizure of a minor child to the child's teachers or school administrators. *See, e.g., T.L.O.*, 469 U.S. at 336 (rejecting argument that teachers and school administrators stand *in loco parentis* for purposes of authorizing Fourth Amendment searches and seizures). Whatever the scope of a parent's implicit consent to any searches or seizures of their minor children in the context of the educational process, such consent certainly does not extend to searches or seizures by law enforcement officials unrelated to the educational process. Indeed, this Court "has recognized that 'the concept of parental delegation' as a source of school authority is not entirely 'consonant with compulsory education laws.'" *Id.* (quoting *Ingraham v. Wright*, 430 U.S. 651, 662 (1977)); *see also Tenenbaum v. Williams*, 193 F.3d 581, 594 n.9 (2d Cir. 1999) ("The handing over of a child from a public school teacher to another State official ... is not the equivalent of the consent of the parents.").

In short, petitioners' warrantless seizure of S.G. at school was not "reasonable" under the Fourth Amendment because they did not seek parental consent and no exigent circumstances were present.

CONCLUSION

For the foregoing reasons, if this Court reaches the merits, it should affirm the judgment.

Respectfully submitted,

CHRISTOPHER LANDAU, P.C.
Counsel of Record
MICHAEL A. GLICK
KIRKLAND & ELLIS LLP
655 Fifteenth St., NW
Washington, DC 20005
(202) 879-5000
clandau@kirkland.com

Counsel for Amici Curiae

January 31, 2011

Nos. 09-1454 and 09-1478

12

Supreme Court, U.S.
FILED
DEC 17 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

JAMES ALFORD,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF ARIZONA, ALABAMA, ALASKA, ARKANSAS, CALIFORNIA, COLORADO, DELAWARE, DISTRICT OF COLUMBIA, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, IOWA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH DAKOTA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

TERRY GODDARD
ARIZONA ATTORNEY GENERAL
*PAULA S. BICKETT
CHIEF COUNSEL, CIVIL APPEALS
KATHLEEN P. SWEENEY
DAWN R. WILLIAMS
MICHELLE R. NIMMO
ASSISTANT ATTORNEYS GENERAL
*Counsel of Record

15 South 15th Avenue
Phoenix, Arizona 85007
(602) 542-8027
SolicitorGeneral@azag.gov
Counsel for the State of Arizona

[Other Counsel Listed On Inside Front Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

455e
55

TROY KING
ALABAMA ATTORNEY GENERAL
500 Dexter Avenue
Montgomery, AL 36130
(334) 242-7300

RICHARD A. SVOBODNY
ALASKA ACTING ATTORNEY GENERAL
Department of Law
P.O. Box 110300
Juneau, AK 99811-0300
(907) 465-3600

DUSTIN MCDANIEL
ARKANSAS ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, AR 72201
(501) 682-2007

EDMUND G. BROWN JR.
CALIFORNIA ATTORNEY GENERAL
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
(916) 445-9555

JOHN W. SUTHERS
COLORADO ATTORNEY GENERAL
1525 Sherman Street,
Seventh Floor
Denver, CO 80203
(303) 866-5634

JOSEPH R. BIDEN, III
DELAWARE ATTORNEY GENERAL
820 N. French Street,
6th Floor
Wilmington, DE 19801
(302) 577-8400

PETER J. NICKLES
DISTRICT OF COLUMBIA ATTORNEY GENERAL
One Judiciary Square
441 4th Street, N.W.
Suite 600 South
Washington, D.C. 20001
(202) 727-3400

BILL MCCOLLUM
FLORIDA ATTORNEY GENERAL
The Capitol, PL-01
Tallahassee, FL 32399-1050
(850) 414-3300

THURBERT E. BAKER
GEORGIA ATTORNEY GENERAL
132 Judicial Building
40 Capitol Square, SW
Atlanta, GA 30334
(404) 656-3300

RUSSELL A. SUZUKI
HAWAII ACTING ATTORNEY GENERAL
425 Queen Street
Honolulu, HI 96813
(808) 586-1500

LAWRENCE G. WASDEN
IDAHO ATTORNEY GENERAL
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

LISA MADIGAN
ILLINOIS ATTORNEY GENERAL
100 W. Randolph St.,
12th Floor
Chicago, IL 60601
(312) 814-3698

THOMAS J. MILLER
IOWA ATTORNEY GENERAL
1305 East Walnut Street
Des Moines, IA 50319
(515) 281-5164

STEVE SIX
KANSAS ATTORNEY GENERAL
120 SW 10th Avenue, 2nd Floor
Topeka, KS 66612
(785) 296-2215

JACK CONWAY
KENTUCKY ATTORNEY GENERAL
700 Capital Avenue, Suite 118
Frankfort, KY 40601
(502) 696-5300

JAMES D. "BUDDY" CALDWELL
LOUISIANA ATTORNEY
GENERAL
P.O. Box 94005
Baton Rouge, LA 70804-9005
(225) 326-6716

JANET T. MILLS
MAINE ATTORNEY GENERAL
Six State House Station
Augusta, ME 04333
(207) 626-8599

DOUGLAS F. GANSLER
MARYLAND ATTORNEY GENERAL
200 Saint Paul Place
Baltimore, MD 21202
(410) 576-6300

MICHAEL A. COX
MICHIGAN ATTORNEY GENERAL
P.O. Box 30212
Lansing, MI 48909
(517) 373-1110

LORI SWANSON
MINNESOTA ATTORNEY
GENERAL
102 State Capitol
75 Rev. Dr. Martin Luther
King, Jr. Boulevard
St. Paul, MN 55155-1609
(651) 296-6196

JIM HOOD
MISSISSIPPI ATTORNEY
GENERAL
P.O. Box 220
Jackson, MS 39205
(601) 359-3680

STEVE BULLOCK
MONTANA ATTORNEY GENERAL
P.O. Box 201401
Helena, MT 59620-1401
(406) 444-2026

JON BRUNING
NEBRASKA ATTORNEY GENERAL
2115 State Capitol
P.O. Box 98920
Lincoln, NE 68509
(402) 471-2683

CATHERINE CORTEZ MASTO
NEVADA ATTORNEY GENERAL
Office of the
Attorney General
100 North Carson Street
Carson City, NV 89701
(775) 684-1112

MICHAEL A. DELANEY
NEW HAMPSHIRE
ATTORNEY GENERAL
33 Capitol Street
Concord, NH 03301
(603) 271-1202

PAULA T. DOW
NEW JERSEY ATTORNEY
GENERAL
25 Market Street
P.O. Box 080
Trenton, NJ 08625
(609) 292-4930

GARY K. KING
NEW MEXICO ATTORNEY
GENERAL
P.O. Drawer 1508
Santa Fe, NM 87504-1508
(505) 827-6000

WAYNE STENEHJEM
NORTH DAKOTA ATTORNEY
GENERAL
600 East Boulevard Avenue
Bismarck, ND 58505-0040
(701) 328-2210

THOMAS W. CORBETT, JR.
PENNSYLVANIA ATTORNEY
GENERAL
16th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 787-3391

PATRICK C. LYNCH
RHODE ISLAND ATTORNEY
GENERAL
150 S. Main St.
Providence, RI 02903
(401) 274-4400

HENRY D. MCMASTER
SOUTH CAROLINA ATTORNEY
GENERAL
P.O. Box 11549
Columbia, SC 29211
(803) 734-3970

MARTY J. JACKLEY
SOUTH DAKOTA ATTORNEY
GENERAL
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
(605) 773-3215

ROBERT E. COOPER, JR.
TENNESSEE ATTORNEY
GENERAL
P.O. Box 20207
Nashville, TN 37202-0207
(615) 741-3491

GREG ABBOTT
TEXAS ATTORNEY GENERAL
P.O. Box 12548
Austin, TX 78711-2548
(512) 463-2100

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL
Utah State Capitol,
Suite # 230
P.O. Box 142320
Salt Lake City, UT
84114-2320
(801) 538-9600

WILLIAM H. SORRELL
VERMONT ATTORNEY GENERAL
Office of the
Attorney General
109 State Street
Montpelier, VT 05609-1001
(802) 828-3173

ROBERT M. MCKENNA
WASHINGTON ATTORNEY
GENERAL
1125 Washington Street
P.O. Box 40100
Olympia, WA 98504-0100
(360) 753-6200

DARRELL V. MCGRAW, JR.
WEST VIRGINIA ATTORNEY
GENERAL
Office of the
Attorney General
State Capitol, Room 26-E
Charleston, WV 25305
(304) 558-2021

J. B. VAN HOLLEN
WISCONSIN ATTORNEY
GENERAL
17 West Main Street
Madison, WI 53703
(608) 266-1221

BRUCE A. SALZBURG
WYOMING ATTORNEY GENERAL
123 State Capitol
Cheyenne, WY 82002
(307) 777-7841

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMICI CURIAE STATES	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	8
Requiring a Warrant, Court Order, Parental Consent, or Exigent Circumstances Before Interviewing a Suspected Child-Abuse Victim Is Not Reasonable Under the Fourth Amendment Because Such a Requirement Does Not Adequately Protect the Victim	8
A. The Ninth Circuit Incorrectly Balanced the Competing Interests at Stake in Child-Abuse Investigations Because It Did Not Recognize that Many "Unsubstantiated" Child-Abuse Reports Result from the Inherent Difficulties of Substantiating Maltreatment and Not from False Reporting	9
B. The States Have a Compelling Interest in Using Multidisciplinary Teams to Investigate Child-Abuse Reports to Minimize Further Trauma to Victims and Maximize the Reliability of Investigation Outcomes	21

TABLE OF CONTENTS – Continued

Page

C. Requiring a Warrant, Court Order, Parental Consent, or Exigent Circumstances Before Allowing a Multidisciplinary Team to Interview a Suspected Child-Abuse Victim Undermines the States' Compelling Interests in Detecting and Preventing Child Abuse 30

1. Because initial child-abuse reports are often hearsay statements that will not support probable cause, requiring investigators to obtain prior judicial authorization before interviewing alleged child-abuse victims would seriously impede their investigations 30

2. Given that the majority of child abusers are parents or other members of an abused child's household, requiring parental consent before interviewing a suspected victim may sabotage the goals of protecting children and prosecuting abusers 33

3. If a child welfare agency can determine that an exigency exists before it interviews a child, it can take the child into temporary custody and interview the child 37

TABLE OF CONTENTS – Continued

Page

D. It Is Reasonable to Interview a Suspected Child-Abuse Victim at School.... 38

CONCLUSION..... 41

TABLE OF AUTHORITIES

Page

CASES

Calabretta v. Floyd, 189 F.3d 808 (9th Cir. 1999) 2, 22

Darryl H. v. Coler, 801 F.2d 893 (Ill. 1986) 38

Decatur City Bd. of Educ. v. Aycock, 562 So. 2d 1331 (Ala. App. 1990) 32

Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009) ..... *passim*

H.R. v. State Dep't of Human Res., 612 So. 2d 477 (Ala. Civ. App. 1992) 32

Parham v. J.R., 442 U.S. 584 (1979) 16

Pennsylvania v. Ritchie, 480 U.S. 39 (1987) 30, 36

Rogers v. County of San Joaquin, 487 F.3d 1288 (9th Cir. 2007) 38

R.S. v. State, 459 N.W.2d 680 (Minn. 1990) 30, 36

Santosky v. Kramer, 455 U.S. 745 (1982) 1

Wong Sun v. United States, 371 U.S. 471 (1963) 31

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. IV ..... *passim*

STATUTES

18 U.S.C. § 3509(g)(1) 24

18 U.S.C. § 3771(a)(1) 24

25 U.S.C. § 3206(b) 37

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 5106a(a)(2)(A) 23

42 U.S.C. § 5106a(b)(2)(A)(xi) 23

Ariz. Rev. Stat. § 8-304(B) 26

Ariz. Rev. Stat. § 8-801(2) 26

Ariz. Rev. Stat. § 8-807(B) 26

Ariz. Rev. Stat. § 8-817 26

Cal. Penal Code § 11164(b) 28

Cal. Penal Code § 11174.3 40

Haw. Rev. Stat. § 587A-1 25

Haw. Rev. Stat. § 587A-11(2) 25

Minn. Stat. Ann. § 626.556 subd. 10(a) 28

N.D. Cent. Code Ann. § 50-25.1-05(2)(c) 40

N.D. Cent. Code Ann. § 50-25.1-05.05 40

N.H. Rev. Stat. Ann. § 169-C:38-a 26

N.H. Rev. Stat. Ann. § 169-C:38, IV 40

N.Y. Soc. Serv. Law § 423-a(1), (2)(f) 28

Okla. Stat. Ann. tit. 10A, § 1-2-105(B)(1) 40

Okla. Stat. Ann. tit. 10A, § 1-2-105(B)(5) 26

Okla. Stat. Ann. tit. 10A, § 1-9-102 26

Pub. L. No. 93-247, 88 Stat. 4 (Jan. 31, 1974) 23, 24, 25

Vt. Stat. Ann. tit. 33, § 4915(f) 26

Wash. Rev. Code Ann. § 26.44.030(12)(a) 40

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

88 Op. Att'y Gen. 84 (Ariz. 1988) 40

89 Op. Att'y Gen. 49 (Utah 1990) 40

Ruby Andrew, *Child Sexual Abuse and the State: Applying Critical Outsider Methodologies to Legislative Policymaking*, 39 U.C. DAVIS L. REV. 1851 (2006) 15

Jennifer M. Collins, *Lady Madonna, Children at Your Feet: The Criminal Justice System's Romanticization of the Parent-Child Relationship*, 93 IOWA L. REV. 131 (2007) 14, 30, 34, 36

John Doris, Rosaleen Mazur & Marney Thomas, *Training in Child Protective Services: A Commentary on the Amicus Brief of Bruck and Ceci*, 1 PSYCHOL. PUB. POL'Y & L. 479 (1995) 28, 29

Brett Drake, *Unraveling "Unsubstantiated,"* 1 Child Maltreatment 261 (1996) 13

Brett Drake, Melissa Johnson-Reid, Ineke Way & Sulki Chung, *Substantiation and Recidivism*, 8 Child Maltreatment 248 (2003) 13

Ann N. Elliot & Connie N. Carnes, *Reactions of Nonoffending Parents to Sexual Abuse of Their Child: A Review of the Literature*, 6 Child Maltreatment 314 (2001) 18

Kathleen Coulborn Faller, *Interviewing Children About Sexual Abuse: Controversies and Best Practices* (2007) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Marcia Herman-Giddens & Thomas E. Frothingham, *Prepubertal Female Genitalia: Examination for Evidence of Sexual Abuse*, 80 Pediatrics 203 (1987) 31

Hearing on S.B. 2716 before Sen. Comm. on Human Svs., 25th Leg., Reg. Sess. (HI 2010).....25

Lisa M. Jones, Kathryn E. Atoro & Wendy A. Walsh, *Nonoffending Caregiver and Youth Experiences with Child Sexual Abuse Investigations*, 25 Journal of Interpersonal Violence 291 (2010).....21

Owen D. Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 N.C. L. Rev. 1117 (1997) 34

Patricia Kohl, Melissa Johnson-Reid & Brett Drake, *Time to Leave Substantiation Behind: Findings from a National Probability Study*, 14 Child Maltreatment (Issue No. 1) 17 13

Danielle Laraque, Amy DeMattia & Chrstine Low, *Forensic Child Abuse Evaluation: A Review*, The Mount Sinai Journal of Medicine, vol. 73 No. 8 (Dec. 2006).....20

Kee MacFarlane & Jill Waterman, *Sexual Abuse of Young Children* (1986) 28

Tomiko D. Mackey, *Child Abuse: Victim's Race and Prosecution, Is There a Correlation?*, 26 Hamline J. Pub. L. & Pol'y 131 (2006).....29

TABLE OF AUTHORITIES – Continued

Page

Lindsay C. Malloy & Thomas D. Lyon, *Caregiver Support and Child Sexual Abuse: Why Does It Matter?*, 15 Journal of Child Sexual Abuse (Issue No. 4) 97 (2006) 17, 18, 20

Judith G. McMullen, *Privacy, Family Autonomy, and the Maltreated Child*, 75 MARQ. L. REV. 569 (1992) 34

Mo. Dep't of Soc. Servs., *Child Welfare Manual* 25

Mo. Dep't of Soc. Servs., *Guidelines for Mandated Reporters of Child Abuse and Neglect* 40

John E.B. Myers, *Evidence in Child Abuse and Neglect Cases*, vol. 1 (2nd ed. 1992) 31

William Wesley Patton, *Revictimizing Child Abuse Victims: An Empirical Rebuttal to the Open Juvenile Dependency Court Reform Movement* (2005) 28, 39

Denise Pintello & Susan Zuravin, *Intrafamilial Child Sexual Abuse: Predictors of Post-disclosure Maternal Belief and Protective Action*, 6 Child Maltreatment 344 (2001) 16, 17

Timothy Ross, Francesca Levy & Robert Hope, Vera Inst. of Justice, *Improving Responses to Allegations of Severe Child Abuse: Results from the Instant Response Team Program* (2004) 35

Charol Shakeshaft, "Educator Sexual Abuse," *Hofstra Horizons* (Spring 2003) 39

TABLE OF AUTHORITIES – Continued

Page

Elena Silva, Education Sector Reports, *On the Clock: Rethinking the Way Schools Use Time* (2007) 39

Linda Spears, "The Role of the Child Welfare League of America," in *Preventing Child Sexual Abuse: A National Resource Directory and Handbook* (2005) 22

Caroline T. Trost, *Chilling Child Abuse Reporting: Rethinking the CAPTA Amendments*, 51 VAND. L. REV. 183 (1998) 32

U.S. Dep't of Health & Human Servs. Admin. for Children & Families, *Child Maltreatment Report for 2007* (2007) 10, 11, 12

U.S. Dep't of Health & Human Servs. Admin. for Children & Families, *Child Maltreatment Report for 2008* (2008) 14, 15, 37

U.S. Dep't of Justice, *Attorney General Guidelines for Victim and Witness Assistance* (2005) 24

Tisha R. Wiley, *Legal and Social Service Responses to Child Sexual Abuse: A Primer and Discussion of Relevant Research*, 18 Journal of Child Sexual Abuse 267 (2009) 13, 14, 19, 20

Amy P. Winterfeld & Taina Sakagawa, *Investigation Models for Child Abuse and Neglect – Collaboration with Law Enforcement* (2003) 26, 27, 28

INTEREST OF THE AMICI CURIAE STATES

Amici States share a compelling *parens patriae* interest in protecting children. *Santosky v. Kramer*, 455 U.S. 745, 766 (1982). In furtherance of that interest, many States have enacted statutes or adopted policies designed to encourage child welfare agencies and law enforcement departments to cooperate in investigating and prosecuting child abuse.

In this case, the Ninth Circuit held that because "law enforcement personnel and purposes" were involved in caseworker Bob Camreta and deputy sheriff James Alford's (Petitioners) warrantless in-school interview of S.G., an allegedly abused child, the interview violated the Fourth Amendment's guarantee against unreasonable searches and seizures.[1] *Greene v. Camreta*, 588 F.3d 1011, 1027 (9th Cir. 2009). The Ninth Circuit's decision will hamper States' ability to effectively and sensitively investigate child-abuse[2] allegations by preventing child protective services (CPS) workers and law enforcement from interviewing suspected abuse victims at school in the absence of a warrant, a court order,

---

[1] Given that Petitioners "[did] not contest the district court's holding that the two-hour interview of S.G. at her school was a seizure," *Greene*, 588 F.3d 1011, 1022 (9th Cir. 2009), Amici address the Fourth Amendment seizure considerations without conceding that social worker or law enforcement personnel interviews of alleged child-abuse victims in the public school setting implicate Fourth Amendment interests.

[2] Except where otherwise apparent, the term "child abuse" refers here to child-maltreatment generally, including neglect.

parental consent, or exigent circumstances. Not allowing such interviews will undermine States' ability to protect vulnerable children from being sexually abused by parents or other members of the abused child's household.

SUMMARY OF THE ARGUMENT

In its ruling, the Ninth Circuit reiterated its earlier holding that "'the general law of search warrants applie[s] to child abuse investigations.'" *Greene*, 588 F.3d at 1030 (quoting *Calabretta v. Floyd*, 189 F.3d 808, 814 (9th Cir. 1999)). Finding that law enforcement purposes were too entangled in the investigation of the possible sexual abuse of S.G., the court held that "the decision to seize and interrogate S.G. in the absence of a warrant, a court order, exigent circumstances, or parental consent was unconstitutional." *Id.* That approach overlooks that the participation of law enforcement in the joint interview of suspected child-abuse victims serves not merely law enforcement purposes, but also the victims' own interests in being afforded a safe and appropriate opportunity to disclose abuse away from the influence of a parental perpetrator or non-offending, but unsupportive, caregiver. It further overlooks the States' related and compelling interest in applying best practices for child-abuse investigations – of which child interviews are a keystone – to maximize their ability to reliably discover abuse where it occurs and minimize trauma to child victims.

To the detriment of the same children that it sought to protect, the Ninth Circuit's decision unnecessarily requires parental consent, a warrant, a court order, or exigent circumstances before CPS and law enforcement may cooperatively interview a suspected child-abuse victim. Realistically, imposing those requirements will cause many abused children to remain in harm's way because the Ninth Circuit's unnecessary and erroneous rule hampers States' abilities to protect children and prosecute abusers.

Because the Ninth Circuit relied on inaccurate and incomplete information about the realities of child-abuse investigations, it failed to strike the correct balance of the competing public and private interests at stake. First, in weighing parents' and children's interests in avoiding the intrusion of such investigations, the court incorrectly inflated the number of investigations that fail to result in the substantiation of maltreatment. Second, although millions of CPS child-abuse investigations are, in fact, unsubstantiated, the Ninth Circuit overlooked the many difficulties that attend intrafamilial child-abuse investigations and contribute to "unsubstantiated" outcomes even where maltreatment has occurred. Cooperative CPS and law enforcement investigations, and more particularly cooperative child interviews, have gained wide acceptance as the best practice because such interviews are the most effective tool available for overcoming the many obstacles to obtaining reliable investigative outcomes while simultaneously reducing system-induced trauma to

the child. Yet the Ninth Circuit's ruling here would further curtail the use of this critically important and common practice, leading to even larger numbers of incorrectly unsubstantiated investigative outcomes and protecting fewer children from abuse.

To understand the gravity of the States' interest – and, by extension, the reasonableness of the joint-interview practice absent a warrant, court order, parental consent, or exigent circumstances – one must understand the intrafamilial abuse dynamics that impede child-abuse investigations before any added layer of constitutional protections even comes into play. By their nature, CPS investigations typically involve situations in which the perpetrator is a parent or other family member, and often a member of the child's household. If, as the Ninth Circuit implies, CPS investigations are therefore to be seen as "storming the castle," *see Greene*, 588 F.3d at 1016, then one must also perceive the strength of the fortress walls behind which abused children await rescue.

Comprised of several interlocking monoliths that block the path to reliable detection of intrafamilial abuse, those walls shield abuse and abusers from discovery because: (1) frequently, there is no witness to the abuse other than the child-victim and no physical evidence; (2) the child often has a close relationship to the perpetrator and may even be dependent on him or her for basic care and necessities; (3) the nonoffending caregiver, if any, likewise often has an intimate or other close relationship to

the abuser, and these relationships may be further influenced by imbalances of financial, physical, or other forms of power that lead nonoffending caregivers to protect the perpetrator, rather than the child; and (4) child victims are inherently vulnerable and often reticent to disclose abuse, a phenomenon only compounded by their susceptibility to their abusers' efforts to prevent such disclosure.

The need to overcome these substantial barriers lends great weight to the States' already compelling interest in utilizing those investigative methods most likely to create an atmosphere in which children will disclose enough information about their abuse to enable the government to intervene and protect them. States have recognized that cooperation among agencies is the best means of advancing that interest while minimizing investigation-related trauma to victims of child abuse. Most States therefore employ some variation of multidisciplinary teams (MDTs) to investigate reports of intrafamilial child abuse. One goal of MDTs is to reduce the number of interviews to which a child is subjected, minimizing both the risk of suggestibility in the interviewing process and the traumatic effects of the child's retelling his or her tale of maltreatment to multiple interviewers. Importantly, MDTs' widespread use has not as a rule resulted in unreasonably intrusive investigative experiences for children and families who undergo child sexual-abuse investigations. Instead, a recent study revealed that most children and nonoffending caregivers reported feeling satisfied with their investigation experiences.

These successful strides in striking the right balance between the public and private interests at stake – achieved over decades by the cumulative efforts of experts in all aspects of child maltreatment – are directly threatened by the Ninth Circuit's decision here. Initial child-abuse reports are often hearsay statements that will not support the finding of probable cause necessary to obtain a warrant or court order. Accordingly, requiring investigators to obtain prior judicial authorization before interviewing alleged child-abuse victims would seriously impede their investigations. Coupling that with what is known about the reticence of many child-abuse victims to disclose abuse absent the use of child-sensitive investigative techniques, the expectation that probable cause could be obtained in an abbreviated encounter with the child defies the realities of intrafamilial child-abuse dynamics. Sexually abused children who do not disclose their abuse until adulthood establish that many children already go unprotected. Imposing a warrant requirement will only increase their ranks.

Requiring parental consent before interviewing a suspected victim will similarly sabotage the compelling state interests in protecting children and prosecuting perpetrators of child abuse. Abuse-related deaths comprise the leading cause of trauma death in young children, and research establishes that large numbers of, though not all, nonoffending caregivers will fail to protect their children even from known abuse. Consequently, any presumption that parents

of allegedly abused children, as a group, will consent to investigative interviews designed to elicit information sufficient to uncover child abuse is a dangerous fallacy. In no other context would a court countenance requiring a state agent to obtain a criminal suspect's advance consent to interview the alleged victim, especially when the victim is one who is particularly susceptible to the alleged perpetrator's influence or coercion. Yet the Ninth Circuit's ruling contemplates exactly that.

Requiring a demonstration that exigent circumstances justify interviewing a child at school in the absence of a warrant or parental consent presents similar problems. If exigencies become known to CPS, the child may be taken into a State's protective custody in proceedings to protect that child. Once the child is in the State's custody, investigative interviews may take place under that authority. That is a far greater intrusion into the family than simply interviewing the child. More importantly, children in cases where exigencies are known before the child is interviewed are not the children whose welfare the Ninth Circuit's ruling jeopardizes. Instead, it is those children whose circumstances are not sufficiently known and cannot be determined in the absence of an effective investigative interview.

By contrast, allowing States to effect in-school interviews of children is a reasonable alternative that satisfactorily balances the relative interests involved. Children are likely to be available during predictable and reasonable hours at school. More importantly,

school is a familiar setting to most children, and one likely to be away from both the location and the perpetrator of the suspected intrafamilial abuse.

Applying the reasonableness balancing test that this Court has applied in similar circumstances would adequately protect the relative interests at stake and lead to the conclusion that the interview, or "seizure," of S.G. conducted here was reasonable and did not run afoul of the Fourth Amendment. Accordingly, this Court should reverse that portion of the Ninth Circuit's judgment that holds that Petitioners violated the Fourth Amendment.

ARGUMENT

Requiring a Warrant, Court Order, Parental Consent, or Exigent Circumstances Before Interviewing a Suspected Child-Abuse Victim Is Not Reasonable Under the Fourth Amendment Because Such a Requirement Does Not Adequately Protect the Victim.

Petitioners have addressed the legal issues supporting their argument that the Ninth Circuit erred in holding that they violated the Fourth Amendment when they interviewed S.G. at her school without obtaining a warrant, court order, or parental consent, and in the absence of exigent circumstances. Thus, Amici States will focus on the difficulties involved in investigating child abuse; the need for MDTs to investigate child abuse; and the reasons that

requiring prior judicial authorization, parental consent, or exigent circumstances before allowing a child-abuse victim to be interviewed would seriously undermine the States' ability to detect and prevent child abuse and thereby harm the very victims whom the Ninth Circuit wanted to protect. The standard applied to determine whether interviews of suspected child-abuse victims comply with Fourth Amendment requirements should recognize the inherent differences in interviewing children who are victims of abuse versus those who are being investigated as suspects.

A. The Ninth Circuit Incorrectly Balanced the Competing Interests at Stake in Child-Abuse Investigations Because It Did Not Recognize that Many "Unsubstantiated" Child-Abuse Reports Result from the Inherent Difficulties of Substantiating Maltreatment and Not from False Reporting.

The Ninth Circuit identified the competing interests at issue in this case as society's "compelling interest in protecting its most vulnerable members from abuse within their home" on one hand, and parents' "exceedingly strong interest[s] in directing the upbringing of their children . . . [and] protecting both themselves and their children from the embarrassment and social stigmatization attached to child abuse investigations" on the other. *Greene*, 588 F.3d at 1015-16. The Ninth Circuit implied that parents'

interest in protecting themselves from potential negative consequences of CPS investigations is "exceedingly strong," in part, because "only about a quarter" of "the millions of investigations conducted by state and local agencies in 2007 . . . concluded that the children were indeed victims of abuse." *Id.* at 1015-16. The reader is left to draw the mistaken inference that roughly 75% of those investigations must have needlessly exposed parents and children to "embarrassment and social stigmatization" where the child-abuse allegations investigated were simply false. But the court's assumption is wrong because it inaccurately inflates the number of investigations and overlooks the difficulties inherent in investigating intrafamilial child abuse that can result in the failure to substantiate maltreatment.

The Ninth Circuit inaccurately states that in that same year, "state and local agencies investigated 3.2 million reports of child abuse or neglect." *Greene*, 588 F.3d at 1015 (citing the *Child Maltreatment Report for 2007* by the U.S. Department of Health and Human Services Administration for Children and Families).[3] The court's statement is inaccurate in two ways. First, it refers to 3.2 million "reports," when, in fact, the cited *Child Maltreatment Report* states that CPS agencies received 3.2 million "referrals." *Child Maltreatment Report for 2007*, *supra*, ch. 2. Second,

---

[3] Accessible at http://www.acf.hhs.gov/programs/cb/pubs/cm07/chapter2.htm (viewed December 14, 2010) (hereinafter *Child Maltreatment Report for 2007*).

the *Greene* ruling states that all 3.2 million of these were "investigated," when, in fact, 38% of them were not. *Id.*

When CPS agencies receive a referral, a screening process determines whether the referral meets state criteria for investigation or assessment. *Id.* Only those referrals that meet those criteria become a "report" and reach the investigative or assessment stage. *Id.* As the *Child Maltreatment Report for 2007* plainly states, only 62% of the 3.2 million referrals received in fiscal year 2007 reached the report-and-investigation stage, meaning that 38% were "screened out." *Id.* Accordingly, the Ninth Circuit's statement that 3.2 million "reports" were "investigated," *Greene*, 588 F.3d at 1015, is incorrect. Well over one million of those referrals were never investigated at all. *Child Maltreatment Report for 2007*, *supra*, ch. 2.

With regard to the other 62% of referrals that were "screened in" for investigation or assessment in 2007, 61.3% were determined to be "unsubstantiated." *Child Maltreatment Report for 2007*, *supra*, ch. 2. An "unsubstantiated" report means "[a]n investigation disposition that determines that there was not sufficient evidence under State law to conclude or suspect that the child was maltreated or at risk of being maltreated." *Id.* A "substantiated" report denotes "[a]n investigation disposition that concludes that the allegation of maltreatment or risk of

maltreatment was supported or founded by State law or State policy." *Id.*

Although the *Child Maltreatment Report for 2007* categorically includes "unsubstantiated" dispositions among a class of investigations described as having "led to a finding that the children were not victims of maltreatment," *id.*, such findings do *not* necessarily mean that abuse did not occur or that the children were not at risk for maltreatment.[4] Certainly, a report might be unsubstantiated because abuse did not occur or no identifiable risk was present. However, because the absence of "sufficient evidence under State law" is the defining feature of an unsubstantiated report, barriers to obtaining "sufficient evidence" of child abuse to justify substantiation may also be responsible. Notably, "children whose cases are determined to be unsubstantiated and children whose cases are substantiated are equally likely to return to the system, regardless of how stringent the criteria used to define rereferral. This trend would not be

---

[4] "Unfortunately, some authors, referring to the proportion of cases that are not substantiated, imply that an unsubstantiated case is the equivalent of a deliberate false allegation," and, "[b]ased upon this distortion, . . . have asserted that there is an overwhelming flood of false, maliciously made reports of child maltreatment." Kathleen Coulborn Faller, *Interviewing Children About Sexual Abuse: Controversies and Best Practices* (2007) at 193-94 (citations omitted). Others "have declared that there is an atmosphere of hysteria about allegations of sexual abuse . . . and have compared this to the Salem witch trials," but "[n]o data . . . are provided to support these assertions." *Id.* at 194 (citations omitted).

expected if it were simply the case that unsubstantiated cases were false." Tisha R. Wiley, *Legal and Social Service Responses to Child Sexual Abuse: A Primer and Discussion of Relevant Research*, 18 Journal of Child Sexual Abuse 267, 282 (2009) (citing Brett Drake, Melissa Johnson-Reid, Ineke Way, and Sulki Chung, *Substantiation and Recidivism*, 8 Child Maltreatment 248 (2003); Brett Drake, *Unraveling "Unsubstantiated,"* 1 Child Maltreatment 261 (1996)); *see also* Patricia Kohl, Melissa Johnson-Reid, and Brett Drake, *Time to Leave Substantiation Behind: Findings from a National Probability Study*, 14 Child Maltreatment 17 (finding risk of recidivism similar regardless of substantiation status of the index investigation).

An unknown proportion of "unsubstantiated" investigations are therefore "false negative" outcomes (meaning that maltreatment occurred but went undetected). Many of these false negative CPS investigative outcomes result from the fact that child-abuse investigations, by nature, present a minefield of intrinsic obstacles that CPS investigators (with or without the participation of law enforcement) must overcome, notwithstanding any additional layer of Fourth Amendment protections afforded to the abusers or their child victims. Because the Ninth Circuit failed to understand these complexities, it erred in holding that Petitioners violated the Fourth Amendment when they interviewed a suspected child-abuse victim without prior judicial authorization, parental consent, or exigent circumstances. It also failed to

recognize the gravity of the States' interest in ensuring that their investigative methods – specifically, child interviews – are as likely as possible to succeed in both unearthing child abuse and preventing the infliction of investigation-related trauma on the abused children that States most need to protect.

First among the dynamics involved, "[t]here are typically no witnesses to the abuse other than the child victim. . . ." Jennifer M. Collins, *Lady Madonna, Children at Your Feet: The Criminal Justice System's Romanticization of the Parent-Child Relationship*, 93 IOWA L. REV. 131, 151 (2007). Likewise, in child sexual abuse cases, "physical evidence is often nonexistent or inconclusive." Wiley, *supra*, at 275. For these reasons, "[i]nterviewing child victims is a crucial aspect of investigations. . . ." *Id.*

Second, the child often has a close relationship to his or her abuser, as does the co-offending or nonoffending parent in many cases. According to the *Child Maltreatment Report for 2008*, 81.2% of the victims were maltreated by a parent.[5] Stepparents inflicted the abuse in 4.4% of the cases, parents' unmarried partners inflicted the abuse in another

---

[5] *See* http://www.acf.hhs.gov/programs/cb/pubs/cm08/figure3_6.htm (Figure 3-6, Victims by Perpetrator Relationship, 2008) (viewed December 14, 2010); *see also* http://www.acf.hhs.gov/programs/cb/pubs/cm08/chapter3.htm (reflecting that approximately 39% of the victims were maltreated by their mother, 18% by their father, and 18% by both parents) (viewed December 14, 2010).

4.4% of the cases, and other relatives inflicted the abuse in 6.5% of the cases.[6] It is therefore likely that many of the perpetrators also lived in the child's household. Like other forms of maltreatment in CPS cases, "[c]hild sexual abuse remains, in the overwhelming majority of cases, a crime perpetrated by members of the child's family and circle of trust." Ruby Andrew, *Child Sexual Abuse and the State: Applying Critical Outsider Methodologies to Legislative Policymaking*, 39 U.C. DAVIS L. REV. 1851, 1853 (2006).

Third, not only are child sexual abusers likely to be close to the child, but they "may have engaged in a range of strategies to prevent children from disclosing sexual abuse." Faller, *supra* note 4, at 175. In other words, abusers – most often the child's parent or parents, who have ready access to the child – may actively foster the potential for false negative investigation outcomes. By contrast, professionals who interview children about sexual abuse "are usually strangers to the children they interview," and will often employ an interview protocol designed to avoid "false-positives" (*e.g.*, asking open-ended questions to counter any suggestibility of the child). *Id.*

Finally and consequently, intrafamilial relationship dynamics profoundly, and negatively, affect the likelihood that CPS investigations will discover "sufficient

---

[6] *See* http://www.acf.hhs.gov/programs/cb/pubs/cm08/chapter5.htm (viewed December 14, 2010).

evidence" of child abuse to allow for substantiation. Virtually by definition, CPS investigations most often involve the child's parents or parent figures. But research suggests that the likelihood of a child disclosing abuse drops considerably when the abuser is a parent figure or when a nonoffending parent is unsupportive of the child. *See* Faller, *supra* note 4, at 189. Faller's comprehensive review of research on child sexual-abuse interviews "supports a conclusion that there are substantial numbers of false negatives or disclosure failures in cases of actual sexual abuse," particularly in "cases of children abused by someone close to them and cases in which children's caretakers are unsupportive." *Id.* Cases of this nature "seem to result in a very high number of disclosure failures." *Id.*

Notwithstanding traditional legal presumptions about parents' tendencies to act in their children's best interests, *see Parham v. J.R.*, 442 U.S. 584, 602 (1979), empirical data show that the presence of a supportive or protective caretaker cannot reasonably be presumed in the context of intrafamilial child sexual abuse and, by extension, neither can the likelihood of the child's disclosure. For example, in a study of 435 biological, nonoffending mothers of children involved with CPS who were victims of sexual abuse perpetrated by a parent, relative, or household or family member, nearly one-third (30.8%) neither believed nor protected their children. Denise Pintello and Susan Zuravin, *Intrafamilial Child Sexual Abuse: Predictors of Postdisclosure Maternal*

Belief and Protective Action, 6 Child Maltreatment 344, 347-48 (2001). In fact, only 41.8% of the mothers believed their children's disclosures and took protective action. *Id.* And the remaining 27.3% of the mothers had "ambivalent" reactions, meaning they either believed that abuse had occurred but did not protect their children or took protective action despite their disbelief. *Id.* at 348. In sum, as many as 44.1% of mothers did not take protective action. *Id.* at 347-48.

Moreover, mothers' relationships to the abusers influenced the likelihood that they would believe and protect their children. More than half of the mothers were in a current sexual relationship with the offender, *id.* at 346, but those who were not in such relationships were 4.3 times more likely to believe and protect their sexually abused children, *id.* at 348.

The chilling effect of a nonoffending parent's disbelief or unsupportiveness tends to survive even in the presence of compelling medical evidence of abuse. *See* Lindsay C. Malloy and Thomas D. Lyon, *Caregiver Support and Child Sexual Abuse: Why Does It Matter?*, 15 Journal of Child Sexual Abuse (Issue No. 4) 97, 98 (2006) (discussing a study in which children presenting a sexually transmitted disease in the absence of prior suspicions of abuse failed to disclose at dramatically different rates when children had supportive [37%] versus nonsupportive caregivers [83%]). "Many children, if they disclose at all, will disclose to their mothers," but "[n]onsupportive caregivers . . . are unlikely to report the abuse to social services [and] (even supportive caregivers may

have reasons not to notify the authorities)."[7] *Id.* at 99. These so-called "dead-end" disclosures may further reduce, preclude, or delay the likelihood of disclosure. *Id.*

But perhaps most significantly, even if a caregiver reports the abuse, the caregiver's unsupportiveness nevertheless "may lead the child to fail to disclose the abuse when questioned by CPS. *This would likely prevent substantiation and intervention, because social workers primarily rely on a disclosure from the child to substantiate abuse.*" *Id.* (emphasis added).

The presence of an abusive parent, not surprisingly, also correlates with lower disclosure rates among physically and sexually abused children. For example, in a review of more than 26,000 forensic interviews conducted for physical and sexual abuse, almost *two-thirds* of the alleged offenders were parent figures, yet disclosure of abuse occurred in only 20.9% of cases involving parent figures, compared to 89.3% of nonparent cases. *See* Faller, *supra* note 4, at 54.

---

[7] Many factors influence maternal belief or supportiveness following disclosure of sexual abuse, including intimacy, financial dependence, or cohabitation with the offender; the mother's own history of abuse; the victim's age (younger children are more likely to be believed); and the victim's gender. *See* Ann N. Elliot and Connie N. Carnes, *Reactions of Nonoffending Parents to Sexual Abuse of Their Child: A Review of the Literature*, 6 Child Maltreatment 314, 317-19 (2001).

Given these known barriers to children's disclosure of intrafamilial sexual abuse, an inherent methodology limitation of the related research (only those cases that come to professional attention can be studied) suggests that countless other abused children go wholly unidentified. Faller, *supra* note 4, at 189. "[T]he findings regarding disclosure failures probably represent an underidentification of the problem of children who do not tell." *Id.* "Indeed, many people who are abused never disclose their abuse or only do so as adults." Wiley, *supra*, at 275 (citations omitted). "Children may also blame themselves or feel guilty for their abuse." *Id.* (citations omitted). Even for many children who do tell, "disclosure is a process, which may involve initial denial of abuse and later retraction." Faller, *supra* note 4, at 189.

Against these many hurdles, it is often "the responsibility of child welfare professionals to obtain children's stories through forensic interviewing." Wiley, *supra*, at 275. What this means, of course, is that the children most likely in need of CPS intervention – that is, children who are abused by parent figures and whose nonoffending parents, if any, are unsupportive or not protective – may very well be those least likely to disclose their abuse to anyone, let alone disclose it in a single, brief encounter with a CPS investigator. Such children might very well end up on the rosters of "unsubstantiated" reports – and unprotected children. In one study, as many as 60% of children who made "dead-end" disclosures to a parent

reported that the abuse reoccurred. Malloy, *supra*, at 100.

Accordingly, States have a compelling interest in "getting children to disclose enough information about actual abuse to support a successful investigation and protect children." Wiley, *supra*, at 277 (citations omitted). Best practices guidelines for doing so vary to a degree, but generally advise that the interview should take place in a neutral setting and that the interview be phased, allowing sufficient time for rapport building, information gathering, and closure. *See* Faller, *supra* note 4, at 66-89 (for an overview of interview structure, protocol, and guidelines); Danielle Laraque, Amy DeMattia, and Christine Low, *Forensic Child Abuse Evaluation: A Review*, 73 Mount Sinai Journal of Medicine, 1138, 1142 (2006). Interview structures "are designed to avoid interviewers eliciting false positives, which appear to be a lesser problem than false negatives." Faller, *supra* note 4, at 88. For example, use of rapport building has been shown to increase children's accuracy in event recollection. *Id.* at 72.

Child interviews have come to be widely recognized as "the most viable and valuable source of information about the likelihood of sexual abuse." *Id.* at 35. Contrary to fears that families experience these investigations as socially stigmatizing or embarrassing, *Greene*, 588 F.3d at 1016, a recent study of nonoffending caregiver and youth experiences with child sexual abuse investigations found that both groups were mostly satisfied with their experiences

during the investigative process. *See* Lisa M. Jones, Kathryn E. Atoro, and Wendy A. Walsh, *Nonoffending Caregiver and Youth Experiences with Child Sexual Abuse Investigations*, 25 Journal of Interpersonal Violence 291 (2010). In fact, the chief complaint among nonoffending caregivers was "the feeling that compared to what they had expected, cases were not being pursued effectively or *vigorously enough* by investigators." *Id.* at 307 (emphasis added). Such findings hardly comport with the notion that government widely engages in unreasonable investigative practices in this context.

In sum, States have an imperative interest in ensuring their ability both to interview children whom they reasonably suspect are victims of abuse and to conduct those interviews in a manner that maximizes the likelihood of "actual abuse" disclosures, while minimizing investigation-related trauma and preventing false accusations. Cooperative, or multidisciplinary, investigations are the best available means to that end.

B. The States Have a Compelling Interest in Using Multidisciplinary Teams to Investigate Child-Abuse Reports to Minimize Further Trauma to Victims and Maximize the Reliability of Investigation Outcomes.

States have recognized that the best way to achieve safety for children and to minimize trauma to child victims is to require the state agencies charged

with investigating and prosecuting child abuse to cooperate. Child-abuse investigations necessarily implicate law enforcement issues.[8] Moreover, they are inherently difficult for the children and the families involved. Many States therefore encourage or require cooperation between child-welfare agencies and law enforcement departments because as the Ninth Circuit acknowledged, "[i]t may well be that fostering coordination and collaboration between caseworkers and law enforcement officers is an effective way both to protect children and to arrest and prosecute child abusers - each, of course, governmental activity of the highest importance." *Greene*, 588 F.3d at 1029. Indeed, "[s]ome of the measures which seem to have the greatest impact on lowering instances of child sexual abuse are joint protocols with law enforcement and forensic evaluations – teams with individuals from various fields. . . ." Linda Spears, "The Role of the Child Welfare League of America," in *Preventing Child Sexual Abuse: A National Resource Directory and Handbook* (2005).

Nevertheless, the Ninth Circuit found that law enforcement's direct involvement in the *Greene* investigation necessitated the application of "'the general law of search warrants.'" *Greene*, 588 F.3d at 1030 (quoting *Calabretta*, 189 F.3d at 814). It did so even though the law enforcement officer merely observed

[8] All fifty States have laws criminalizing child abuse. *See* Brief of Amici States in Support of Petition for Certiorari (States' Cert. Amici Brief), n.11.

Camreta's interview of S.G. while simultaneously engaging in an ongoing investigation into criminal charges against S.G.'s father. *See id.* at 1017. What the Ninth Circuit failed to recognize, however, is that state agencies for protecting children and for prosecuting crimes against children are often required to collaborate under state law and under best-practices principles in both the social work and the law enforcement fields.

Beginning with the passage of the Child Abuse Prevention and Treatment Act (CAPTA) in 1974, Pub. L. No. 93-247, 88 Stat. 4 (Jan. 31, 1974) (codified as amended at 42 U.S.C. §§ 5101 to 5119c), the federal government has demonstrated an interest in improving child-abuse prevention efforts, specifically by "creating and improving the use of [MDTs] and interagency protocols to enhance investigations," 42 U.S.C. § 5106a(a)(2)(A). States eligible for federal grants to support the development of these MDTs may lose those funds if they are unable to continue using information that was collaboratively collected in cases in which there was law enforcement involvement. *See* 42 U.S.C. § 5106a(b)(2)(A)(xi) (conditioning eligibility for funding under CAPTA on a State's submission of a plan that assures that a state law or program relating to child abuse and neglect includes "the cooperation of State law enforcement officials, courts of competent jurisdiction, and appropriate State agencies providing human services in the investigation, assessment, prosecution, and treatment of child abuse or neglect").

The U.S. Department of Justice has similarly advocated for the use of MDTs "composed of representatives from health, social service, law enforcement, and legal service agencies to coordinate the assistance needed to handle cases of child abuse." U.S. Dep't of Justice, *Attorney General Guidelines for Victim and Witness Assistance* (2005)[9] at 50. The purpose of these teams "is to maintain the credibility and reliability of the child's testimony as well as to monitor the child's safety and well-being throughout the case." *Id.* Multidisciplinary teams "shall be used when it is feasible to do so," with the goals of minimizing the number of interviews to which the child is subjected "to reduce the risk of suggestibility in the interviewing process," to provide services to the child, and to monitor the child's safety and well-being. *Id.* And, under federal law, victims of crimes have "[t]he right to be reasonably protected from the accused." 18 U.S.C. § 3771(a)(1). More specifically, child victims of crimes are specifically guaranteed the services of MDTs "when it is feasible to do so." 18 U.S.C. § 3509(g)(1).

Following CAPTA's enactment, the States quickly adopted joint-investigation protocols. Missouri identified several ways that joint-investigation protocols can benefit victims and state agencies: reducing the number of interviews for child victims, avoiding

---

[9] Accessible at http://www.justice.gov/olp/pdf/ag_guidelines.pdf (viewed December 14, 2010).

duplication of efforts, enhancing the quality of evidence, smoothing transitions between investigation and intervention, facilitating direct communication between team members, improving team members' skills by "sharing different perspectives," enhancing efficiency, and expediting treatment. Mo. Dep't of Soc. Servs., *Child Welfare Manual*, sec. 2, ch. 4, subsec. 2 (2008).[10] Hawaii just revised its children's code during the 2010 legislative session, in part to bring it into compliance with CAPTA. *See* 2010 Haw. Sess. Laws Act 135 (S.B. 2716) (codified at Haw. Rev. Stat. §§ 587A-1 through -43); *Hearing on S.B. 2716 before Sen. Comm. on Human Servs.*, 25th Leg., Reg. Sess. (HI 2010) (testimony of the Department of the Attorney General 2/4/2010).[11]

That information gleaned from a cooperative investigation between CPS and law enforcement may ultimately be used to pursue criminal charges against an abuser should not negate the collaborative child-interview processes that many state statutes contemplate. For example, Arizona's Legislature required Arizona's Department of Economic Security to develop and implement protocols with law enforcement for

---

[10] Accessible at http://dss.mo.gov/cd/info/cwmanual/section2/ch4/sec2ch4sub2.htm (viewed December 14, 2010).

[11] Notably, Hawaii also allows departmental representatives to "[i]nterview the child without the presence or prior approval of the child's family and temporarily assume protective custody of the child for the purpose of conducting the interview." Haw. Rev. Stat. § 587A-11(2).

investigating and sharing information regarding reports of abuse that implicate certain Arizona criminal statutes. Ariz. Rev. Stat. §§ 8-304(B), -801(2), -807(B), -817.

Oklahoma also requires multidisciplinary investigation of allegations of sexual abuse or serious physical abuse "when appropriate and possible," Okla. Stat. tit. 10A, § 1-2-105(B)(5), to "ensure coordination and cooperation between all agencies involved so as to increase the efficiency in handling such cases and to minimize the stress created for the allegedly abused child by the legal and investigatory process," Okla. Stat. tit. 10A, § 1-9-102. At least nineteen other States have similar statutes in effect that mandate or encourage collaboration between child welfare departments and law enforcement agencies investigating child-abuse allegations.[12]

These federal and state laws and policies are consistent with the recognition by experts in child-abuse investigations that best practices require the use of MDTs. The Children's Services division of American Humane conducted a comprehensive national study to evaluate the effectiveness of varying levels of cooperative child-abuse investigation practices. *See* Amy P. Winterfeld and Taina Sakagawa, *Investigation Models for Child Abuse and Neglect* –

---

[12] *See* States' Cert. Amici Brief, n.13; N.H. Rev. Stat. Ann. § 169-C:38-a, Vt. Stat. Ann. tit. 33, § 4915(f).

Collaboration with Law Enforcement (2003).[13] The investigation revealed that "[a]cross sites, professional disciplines, and among all national representatives, a joint, collaborative approach to investigating child maltreatment by law enforcement and child protective services is seen as the preferred approach. . . ." *Id.* at 7.

The collaborative approach is seen as "a strength of the investigative process" because

> a. It minimizes the trauma to child-victims by reducing the number of times that they must reiterate their retelling of traumatic events.
>
> b. It reduces the trauma and intrusion of the investigative process for non-offending family members by avoiding the annoyance of having government personnel in the household on multiple occasions.
>
> c. The process itself helps to produce interagency collaboration by bringing together personnel from different agencies when the interview is conducted and for pre- and post-interview meetings.
>
> d. The development of common interview guidelines that specify how to conduct a child interview concerning sexual abuse is a strength.

---

[13] Accessible at http://www.americanhumane.org/assets/docs/protecting-children/PC-investigation-models-child-abuse-neglect.pdf (viewed December 14, 2010).

Id. at 13 (internal quotes omitted); *see also* John Doris, Rosaleen Mazur, and Marney Thomas, *Training in Child Protective Services: A Commentary on the Amicus Brief of Bruck and Ceci*, 1 Psychol. Pub. Pol'y & L. 479, 487 (1995) (MDTs have been documented to "reduc[e] the number of interviews a child must undergo," "increase[] the number of perpetrators identified and the number of charges pressed," and increase "the provision of mental health and other services for the sexually abused child.") (citations omitted); Kee MacFarlane and Jill Waterman, *Sexual Abuse of Young Children* (1986) at 318 ("wherever possible, medical, psychological, and law enforcement evaluations should be coordinated and jointly conducted in one place in order to prevent duplication and minimize investigatory trauma to children").[14]

---

[14] Many state laws and policies require cooperation and coordination between child welfare workers and law enforcement personnel precisely to "avoid a duplication of fact-finding efforts and multiple interviews," Minn. Stat. Ann. § 626.556, subd. 10(a), and to "consider the needs of the child victim and . . . do whatever is necessary to prevent psychological harm to the child victim," Cal. Penal Code § 11164(b). Many States also encourage that interviews be kept to a minimum or even specifically limit the number of times that state entities may interview a child-abuse victim to "minimize[] the trauma to the children and their non-offending family members" during investigations. N.Y. Soc. Serv. Law § 423-a(1), (2)(f). "[B]ecause abused children's resilience and defense mechanisms are not as strong as those of adults, children are more likely to suffer renewed episodes of PTSD when questioned about the abuse," making it imperative to limit the situations in which the child is expected to re-live the abuse. William Wesley Patton, *Revictimizing*

(Continued on following page)

States have also mandated that anyone responsible for conducting the interviews possess specialized training to maximize the effectiveness of the interview while minimizing the trauma to the child.[15] Consequently, law enforcement personnel may delegate responsibility for child-victim interviews to trained social workers, while observing the interviews in order to comply with their mandate to investigate and ultimately prosecute child abuse. *See* Doris, *supra*, at 485 (noting that CPS agencies may have necessary investigatory resources that are not available to law enforcement agencies). Finally, the use of MDTs can help eliminate bias in investigating and prosecuting child-abuse and neglect cases due to increased accountability to team members. Tomiko D. Mackey, *Child Abuse: Victim's Race and Prosecution, Is There a Correlation?*, 26 Hamline J. Pub. L. & Pol'y 131, 138 (2006).

Child Abuse Victims: An Empirical Rebuttal to the Open Juvenile Dependency Court Reform Movement (2005) at 315.

[15] *See* States' Cert. Amici Brief, 21-22.

C. Requiring a Warrant, Court Order, Parental Consent, or Exigent Circumstances Before Allowing a Multidisciplinary Team to Interview a Suspected Child-Abuse Victim Undermines the States' Compelling Interests in Detecting and Preventing Child Abuse.

1. Because initial child-abuse reports are often hearsay statements that will not support probable cause, requiring investigators to obtain prior judicial authorization before interviewing alleged child-abuse victims would seriously impede their investigations.

Generally, obtaining a warrant or a court order to authorize an interview of a child requires the entity seeking the warrant or the court order to demonstrate that there is probable cause to believe that the child has been or will be subjected to abuse or neglect. *See* U.S. Const. amend. IV. Demonstrating that probable cause exists is particularly difficult in child-abuse situations because often only the abuser and the victim know about the offense. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) ("Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim."); *accord* Collins, *supra*, at 151. For the same reason, investigative agencies are often unable to determine the validity of an initial abuse report until they interview the alleged child victim. *See R.S. v. State*, 459 N.W.2d 680, 686 (Minn. 1990)

(acknowledging the State's argument that "[b]ecause so often only the child victim and perpetrator have actual specific knowledge of the abuse, . . . the assessment interview is the best means of assessing the truth or falsity of a report of abuse").[16] The prohibition against basing probable cause on untested hearsay statements, such as those that often form the basis for initial child-abuse investigations, exacerbates this conundrum. *See Wong Sun v. United States*, 371 U.S. 471, 479-80 (1963) (stating that untested informant information is insufficient to support probable cause).

Many States do have some procedure for obtaining prior judicial authorization to conduct a search or seizure incident to a child-abuse investigation.[17] However, States have also recognized the difficulties inherent in such procedures. Alabama's courts have noted that requiring CPS to obtain a court order before conducting an interview sometimes "impedes the intent of the child abuse statute and in emergency instances may render it inoperable and

---

[16] The interview of the victim is "the most critical factor in establishing whether or not sexual abuse or exploitation has occurred." Marcia Herman-Giddens and Thomas E. Frothingham, *Prepubertal Female Genitalia: Examination for Evidence of Sexual Abuse*, 80 Pediatrics 203, 208 (1987), given that there is physical or laboratory evidence of sexual abuse in only 10 to 50 percent of cases, John E.B. Myers, *Evidence in Child Abuse and Neglect Cases*, vol. 1, at 268 n.243 (2nd ed. 1992).

[17] *See* States' Cert. Amici Brief, n.4.

ineffective." *Decatur City Bd. of Educ. v. Aycock*, 562 So. 2d 1331, 1335 (Ala. App. 1990). And when the investigation itself may result in criminal proceedings or in the removal of the child, establishing the probable cause necessary to obtain a court order may be difficult if the only source of information regarding the abuse or neglect allegations is the "unsworn hearsay" of a child-abuse hotline report. *H.R. v. State Dep't of Human Res.*, 612 So. 2d 477, 479-80 (Ala. Civ. App. 1992).

Trying to determine whether probable cause exists to support an application for a warrant or court order based on nothing more than the initial child-abuse hotline report or a brief interview with the child increases the chances for error: either determining that there is insufficient evidence to support a warrant resulting in a child being left in a dangerous environment or engaging the court's resources in addition to CPS and law enforcement to undertake a full-blown investigation when none was necessary. *See* Caroline T. Trost, *Chilling Child Abuse Reporting: Rethinking the CAPTA Amendments*, 51 Vand. L. Rev. 183, 204 (1998) ("If a social worker must decide on the basis of a brief phone call or fifteen minute visit whether a report is true, the margin for error is bound to be fairly high.").

Recognizing the problems inherent in obtaining the information necessary to support further investigation of child-abuse claims, many of the same States that have a warrant or a court order procedure for child-abuse cases also permit interviews of children

without a warrant, a court order, or parental approval in certain circumstances.[18]

2. Given that the majority of child abusers are parents or other members of an abused child's household, requiring parental consent before interviewing a suspected victim may sabotage the goals of protecting children and prosecuting abusers.

As discussed above, within the population of abused children, the frequency with which children are abused by a parent or by another household member demonstrates why CPS and law enforcement personnel often have a compelling need to interview suspected abuse victims in a neutral setting away from and without notice to their parents or other household members. *See* Argument I.A, *supra*. Presuming that every parent of an abused child will always do what is necessary to protect that child is a dangerous fallacy:

> [O]ne reason we do not pay sufficient attention to the reality of violence against children in this country, that we struggle with holding some parents accountable for the harm they do to their children, is because of our tendency to romanticize the parent-child relationship. . . . [W]e continue to believe that love, not law, is sufficient to protect our

---

[18] *See* States' Cert. Amici Brief, n.5.

> children, even in situations where love is clearly not enough. In other words, we engage in denial; we want to believe that parents will do the right thing by their children without the intervention of the criminal justice system.

Collins, 93 Iowa L. Rev. at 134.

In cases of maltreatment, the assumption – that parents and families will protect their children from harm – is belied by the frequency of intrafamilial sexual abuse and even infanticide.[19] Moreover, the "belief that parenting comes naturally is not only wrong, it endangers the welfare of children by preventing necessary interventions." Judith G. McMullen, *Privacy, Family Autonomy, and the Maltreated Child*, 75 MARQ. L. REV. 569, 592 (1992). "It is apparent that although parents may be in the best position to assess and act to further their children's best interests, there are no guarantees they will actually do either." *Id.* at 596. "[D]epending on their knowledge, experience, social supports, and environment, parents may not be able to accurately assess the best interests of their children." *Id.* Consequently, giving a parent – whether or not he or she is the

---

[19] "Very conservative estimates of infanticide rates in the United States, for example, range from about three to thirteen abuse-related deaths per day, making abuse the leading cause of trauma death for young children – over auto accidents, accidental falls, choking on food, drowning, and the like." Owen D. Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 N.C. L. REV. 1117, 1172-73 (1997).

abuser – the power to prevent an interview of a child alleged to be the victim of the abuse further victimizes the child.

When, as in the present case, the alleged abuser is a member of the child's household, requiring a parent's consent to interview the child provides the parent with an opportunity to deliberately or inadvertently influence the child's statements regarding any abuse that may have occurred.[20] Even a parent who is not the alleged perpetrator will often have an emotional and/or a financial interest in maintaining an intact family unit. For example, there was some suggestion in the present case that removing the allegedly abusive father from the home would have caused the family financial hardship. *See Greene*, 588 F.3d at 1018.

> [F]amilies often are more supportive of the suspect than the child. For example, in summarizing the findings of a survey of 600 prosecutors, the American Bar Association reported that "[w]e were told time and time again that nonoffending parents (most often

---

[20] *See* Timothy Ross, Francesca Levy, and Robert Hope, Vera Inst. of Justice, *Improving Responses to Allegations of Severe Child Abuse: Results from the Instant Response Team Program* (2004) at 1 ("The arrival of a child protective worker may cause a perpetrator to destroy evidence, influence responses from children, and otherwise hinder law enforcement investigations.") (Accessible at http://www.vera.org/download?file=135/responses%2Bto%2Ballegations%2Bof%2Bchild%2Babuse.pdf (viewed December 14, 2010)).

> mothers) are likely to pressure children to recant, citing economic hardships once the family bread-winner is removed from the home or jailed."

Collins, *supra*, at 153.

Giving parents and other household members the opportunity to taint the evidence that only the child victim can provide frustrates the objectives of both child protective services and law enforcement personnel:

> The purpose of an . . . interview outside the presence of parents, guardians, or other persons responsible for the care of the child is so that welfare officials and police officers may obtain an untainted interview. The reasons for interviewing without parental consent when a parent is the alleged abuser are obvious.

K.S., 459 N.W.2d at 687. Moreover, a "child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent." *Ritchie*, 480 U.S. at 60.

In the interest of protecting children and of obtaining untainted evidence of abuse, many States have codified the circumstances under which children suspected of being abuse victims may be interviewed without parental permission.[21] Regarding child-abuse

[21] *See* States' Cert. Amici Brief, n.8.

investigations in Indian country, Congress codified that when authorities have "reason to believe" that an Indian child has been subjected to abuse, investigating agencies "shall be allowed to interview the child without first obtaining the consent of the parent, guardian, or legal custodian." 25 U.S.C. § 3206(b).

3. If a child welfare agency can determine that an exigency exists before it interviews a child, it can take the child into temporary custody and interview the child.

A requirement of demonstrating that exigent circumstances justify interviewing a child at school in the absence of a warrant or parental consent is similarly problematic. The Ninth Circuit concluded that an exigency exists when "the caseworker has 'reasonable cause to believe that the child is likely to experience serious bodily harm in the time that would be required to obtain a warrant.'"[22] *Greene*, 588 F.3d at

[22] The Ninth Circuit concluded that Camreta's interview of S.G. three days after receipt of the report that she may have been the victim of abuse rendered the "exigent circumstances" exception inapplicable. *Greene*, 588 F.3d at 1030 n.17. The court failed to recognize, however, the staggering workloads under which most CPS caseworkers operate. According to the *Child Maltreatment Report for 2008*, CPS investigated approximately 1.5 million child-abuse referrals in fiscal year 2008, with an average response time between report and investigation of 3.3 days. *See* http://www.acf.hhs.gov/programs/cb/pubs/cm08/chapter2.htm (viewed December 14, 2010). With current economic conditions deteriorating rapidly, state resources for

(Continued on following page)

1030 n.17 (quoting *Rogers v. County of San Joaquin*, 487 F.3d 1288, 1296 (9th Cir. 2007)). If the child welfare agent is able to determine before speaking with the child that the child will suffer harm before prior judicial authorization can be obtained, the State – either through the child welfare agency or law enforcement – can simply take temporary custody of the child and conduct the interview under the auspices of its custody.[23] Doing so, however, is a far greater intrusion into the family than simply interviewing the child. *See Darryl H. v. Coler*, 801 F.2d 893, 902 (Ill. 1986) (recognizing that "extensive interrogations" of families or "widespread inquiries of extra-familial sources" may inflict greater stigma than the initial intervention).

D. It Is Reasonable to Interview a Suspected Child-Abuse Victim at School.

By discouraging the use of at-school interviews, the Ninth Circuit has also affected the States' ability to effectively and safely interview suspected child-abuse victims in a familiar, neutral setting. Interviews of children at school are advisable for a number of reasons. First, children spend a significant amount of time there, making it reasonably certain that an

---

investigating child-abuse and neglect reports are likewise evaporating. The time that elapses between a report and an investigation may therefore reflect a lack of resources rather than a determination that no exigent circumstances exist.

[23] *See* States' Cert. Amici Brief, n.10.

investigator can locate the child quickly. *See* Elena Silva, Education Sector Reports, *On the Clock: Rethinking the Way Schools Use Time* (2007) at 2 (noting that children spend on average 6.5 hours per day at school for 180 days out of the year).[24] Second, the child's school hours will often correspond to the working hours for many mandatory reporters and CPS and law enforcement investigators. Third, a child's abuser is not likely to be present at the school. *See* Argument I.A, *supra* (noting that most abusers are parents or other household members); *see also* Charol Shakeshaft, "Educator Sexual Abuse," *Hofstra Horizons* (Spring 2003) at 11 (noting that only a "small percentage" of educators abuse children). An in-school interview therefore takes place away from the site of the abuse and outside the perpetrator's presence.

Finally, and most importantly, a school is a familiar environment at which the child is likely to feel safe and more relaxed than at a police station or CPS office. The need for a safe environment in which to disclose abuse is "critically important to abused children who have lost a sense of control over their world and who have internalized the betrayal, powerlessness, and stigma often associated with inappropriately disclosed child abuse." Patton, *supra* note 14, at 315. States have also recognized the importance of

[24] Accessible at http://www.educationsector.org/sites/default/files/publications/OntheClock.pdf (viewed December 14, 2010)

interviewing children in a safe place by explicitly authorizing interviewing children at school. *See, e.g.*, 88 Op. Att'y Gen. 84 (Ariz. 1988) ("In some cases CPS cannot adequately investigate and determine whether custody of a child is necessary without obtaining information from the child, preferably in a neutral and non-threatening environment such as a school"); *see also* Cal. Penal Code § 11174.3; N.H. Rev. Stat. Ann. § 169-C:38, IV; N.D. Cent. Code Ann. §§ 50-25.1-05(2)(c), -05.05; Okla. Stat. tit. 10A, § 1-2-105(B)(1); Wash. Rev. Code Ann. § 26.44.030(12)(a); 89 Op. Att'y Gen. 49 (Utah 1990); *see also* Mo. Dep't of Soc. Servs., *Guidelines for Mandated Reporters of Child Abuse and Neglect* at 26.[25]

[25] Accessible at http://www.dss.mo.gov/cd/pdf/guidelines_can_reports.pdf (viewed December 14, 2010).

CONCLUSION

For the foregoing reasons, this Court should reverse the portion of the Ninth Circuit's judgment that holds that Petitioners violated the Fourth Amendment.

TERRY GODDARD
ARIZONA ATTORNEY GENERAL

*PAULA S. BICKETT
CHIEF COUNSEL, CIVIL APPEALS
*_Counsel of Record_
KATHLEEN P. SWEENEY
DAWN R. WILLIAMS
MICHELLE R. NIMMO
ASSISTANT ATTORNEYS GENERAL
Counsel for the State of Arizona

[Other Counsel Listed On Inside Front Cover]

Nos. 09-1454 & 09-1478

In the Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

JAMES ALFORD,
Deschutes County Deputy Sheriff

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF BATTERED WOMEN'S RESOURCE CENTER *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Lauren E. Handel
Counsel of Record
Malinda Moram
McDERMOTT WILL & EMERY LLP
340 Madison Avenue
New York, NY 10173
(212) 547-5400
lhandel@mwe.com
mmoram@mwe.com

Attorneys for Amici Curiae

January 2011

TABLE OF CONTENTS

Page

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 10

ARGUMENT 13

I. There Is A Significant Risk That The State Will Unreasonably Invade The Rights Of Abuse Victims, Particularly In Cases Involving Domestic Violence 13

A. State Intervention Often Causes Greater Harm 13

B. Due To Misconceptions And Biases, State Systems Inappropriately Punish And Re-Victimize Non-Offending Battered Mothers 17

C. Child Protective Services Agents Have Overstepped Constitutional Bounds In Cases Involving Domestic Violence 20

II. Given The Risk Of Unreasonable State Intrusions, Victims And Witnesses Of Abuse Are Entitled To Full Fourth Amendment Protection 22

TABLE OF CONTENTS

Page

A. The Fourth Amendment's Concerns With Preventing Arbitrary Government Intrusions Are Particularly Relevant In Cases Involving Domestic Violence. 22

B. Nothing In The Court's Jurisprudence Suggests That Witnesses And Victims Are Entitled To Less Protection Under The Fourth Amendment. 24

III. Relaxing Fourth Amendment Standards For Child Protection Investigations Will Diminish Fourth Amendment Rights In Domestic Violence Investigations. 27

CONCLUSION 32

TABLE OF AUTHORITIES

Page

Cases

Brigham v. Stuart,
547 U.S. 398 (2006) 30

Brown v. Texas,
443 U.S. 47 (1979) 23

Camara v. Municipal Court,
387 U.S. 523 (1967) 23, 24

Dunaway v. New York,
442 U.S. 200 (1979) 23

Florida v. Royer,
460 U.S. 491 (1983) 24

Georgia v. Randolph,
547 U.S. 103 (2006) 28

Illinois v. Lidster,
540 U.S. 419 (2004) 25, 26

Indianapolis v. Edmond,
531 U.S. 32 (2000) 11

Katz v. United States,
389 U.S. 347 (1967) 22

Mich. Dep't of State Police v. Sitz,
496 U.S. 444 (1990) 26

Nicholson v. Scoppetta,
3 N.Y.3d 357, 820 N.E.2d 840 (N.Y. 2004) 20

Nicholson v. Williams,
203 F. Supp. 2d 153 (E.D.N.Y. 2002) ..... *passim*

Sanchez v. County of San Diego,
464 F.3d 916 (9th Cir. 2006) 30

State v. Greene,
162 Ariz. 431, P.2d 257 (Ariz. 1989) 29

Tierney v. Davidson,
133 F.3d 189 (2d Cir. 1998) 29

United States v. Brooks,
367 F.3d 1128 (9th Cir. 2004) 29

United States v. Martinez-Fuerte,
428 U.S. 543 (1976) 26

Wyman v. James,
400 U.S. 309 (1971) 30

Other Authorities

American Psychological Association, *Violence and the Family* (1996) 16

Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. Rev. 577 (1997) 17

Lundy Bancroft & Jay G. Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (2002) 16

Doriane Lambelet Coleman, *Storming The Castle To Save The Children: The Ironic Costs Of A Child Welfare Exception To The Fourth Amendment*, 47 Wm. & Mary L. Rev. 413 (2005) 13

Charles L. Diviney *et al.*, *Outcomes of Civil Protective Orders: Results From One State*, *J. Interpersonal Violence* (2009) 15

V. Pualani Enos, *Recent Development: Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 Harv. Women's L.J. 229 (1996) 14

Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 Yale J.L. & Feminism 3 (1999) 17, 20

Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 Fla. St. U. L. Rev. 1 (2009) 19, 20

Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims*, *in Do Arrests and Restraining Orders Work* 214 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) 14

David Hirschel, Eve Buzawa, April Pattavina, & Don Faggiani, Domestic Violence and Mandatory Arrest Laws: *To What Extent Do They Influence Police Arrest Decisions*, 98 J. Crim. L. & Criminology 255, no. 1 (2007) 19

Peter G. Jaffe, Nancy K.D. Lemon, & Samantha E. Poisson, Child Custody & Domestic Violence: A Call for Safety and Accountability (2003) 14

T.K. Logan *et al.*, *Protective Orders: Questions and Conundrums, Trauma, Violence, and Abuse* (2006) 15

Ann Malecha *et al.*, *Applying for and Dropping a Protection Order: A Study with 150 Women*, Crim. Just. Pol'y Rev. (2003) 15

G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 Harv. Women's L.J. 89 (1999) 16, 18

National Council of Juvenile & Family Court Judges, *Effective Intervention in Domestic Violence and Child Maltreatment Cases: Guidelines for Policy and Practice* (1999) .....*passim*

New York State Judicial Committee on Women in the Courts, *Women in the Courts: A Work in Progress* (2002) 13, 16

David Owens, *West Hartford Man Arrested Three Times on Domestic Violence Charges*, Hartford Courant (June 1, 2010) 15

Bonnie E. Rabin, *Symposium on Reconceptualizing Violence Against Women by Intimate Partners: Critical Issues: Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 Alb. L. Rev. 1109 (1995) 17

T. Scalzo, *Reporting Requirements for Competent Adult Victims of Domestic Violence* (April 21, 2006) 32

Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (2007) 14, 15

Evan Stark, *The Battered Mother in the Child Protective Service Caseload: Developing an Appropriate Response*, 23 Women's Rts. L. Rep. 107 (2002) ..... *passim*

Patricia Tjaden & Nancy Thoennes, *Extent, Nature and Consequences of Intimate Partner Violence* (2000) 15

Deborah Tuerkheimer, *Exigency*, 49 Ariz. L. Rev. 801 (2007) 14

Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment*, 53 Hastings L.J. 1 (2001) 16, 17

INTERESTS OF *AMICI CURIAE*

Pursuant to Supreme Court Rule 37, the Battered Women's Resource Center; the California Partnership to End Domestic Violence; Domestic Violence Report; Family Violence Law Center; inMotion, Inc.; Lakeshore Legal Aid; Legal Services-NYC; Life Span; My Sisters' Place, Inc.; National Advocates for Pregnant Women; the National Coalition Against Domestic Violence; the New York Legal Assistance Group; Sharwline Nicholson; and the University of Baltimore Family Law Clinic submit this *amici curiae* brief in support of Respondent Sarah Greene. [1]

Battered Women's Resource Center

Founded in 2000, the Battered Women's Resource Center ("BWRC") is a New York based nonprofit that works to empower survivors of domestic violence. BWRC's Voices of Women Organizing Project ("VOW"), brings together survivors of domestic violence to improve the systems that abused women and their children turn to for safety and justice. VOW members organize to promote long-term systemic change by documenting institutional failures, testifying at hearings, creating position papers, and meeting with local and state officials. BWRC's

---

[1] The parties have consented to the filing of *amicus* briefs in support of either party or of neither party. *Amici* confirm that (i) no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief, (ii) no counsel for any party authored any part of this brief, and (iii) no party or counsel contributed money intended to fund the preparation or submission of this brief.

Rights of Children Campaign works to support child safety and freedom from intrusive investigations by the child welfare agency by utilizing a community-organizing approach in which survivors of domestic violence organize and advocate for improvements to the system.

California Partnership To End Domestic Violence

The California Partnership to End Domestic Violence ("CPEDV") is a statewide membership-based coalition of over 175 California organizations, agencies, and individuals working to end domestic violence at local, state, and national levels. CPEDV has a 30-year history of providing a united voice for California's domestic violence advocates and the survivors they serve. Aware of the challenges and injustices that battered women and children often face when interacting with the agencies tasked to protect them, CPEDV is deeply concerned with the potential dilution of the Fourth Amendment rights of victims, regardless of where the questioning takes place. It is based on these realities that CPEDV's membership, through their united voice, urge this Court to consider the far-reaching implications of this case, and to protect the constitutional rights of abuse victims subject to custodial interrogation.

Domestic Violence Report

Domestic Violence Report ("DVR") is a multidisciplinary newsletter that is distributed throughout the nation to 2,000 domestic violence programs and advocates, judges, lawyers, therapists, doctors, clergy, academics, police, probation officers, and oth-

ers interested in ending domestic violence. Since October of 1995, it has published every two months. The newsletter covers all aspects of domestic violence, with particular focus on promoting the safety of domestic violence victims and children. The newsletter editors, contributors, and advisory board work with and train policymakers throughout the nation and assist them in drafting protocols and appropriate responses for domestic violence.

Family Violence Law Center

Family Violence Law Center ("FVLC") has been working to end domestic violence in Alameda County, California since 1978. FVLC operates an integrated service model that includes both protection initiatives for people currently experiencing abuse—including legal services, advocacy, and emergency housing and relocation services—and prevention initiatives to eliminate future abuse. Last year, FVLC provided life-saving services to more than 3,000 survivors and their children, helping them achieve safety and independence and supporting them as they heal. In addition, FVLC works to change institutional barriers for survivors within the legal, health, education, and criminal justice systems.

inMotion, Inc.

Since 1993, inMotion has helped thousands of women free themselves from abusive relationships, stay in their homes, and win the financial support to which they—and their children—are legally entitled. Its mission is to make a real and lasting difference in the lives of low-income, under-served, and abused

women by offering them legal services designed to foster equal access to justice and an empowered approach to life. InMotion fulfills its mission by providing free, quality services, primarily in the areas of matrimonial, family, and immigration law, in a way that acknowledges mutual respect, encourages personal growth, and nurtures individual and collective strength. Informed by this work, inMotion promotes policies that make our society more responsive to the legal issues confronting the women it serves.

Lakeshore Legal Aid

Founded in 1969, Lakeshore Legal Aid (Lakeshore) is a nonprofit legal aid program that provides free, holistic legal services to the poor and vulnerable in Michigan's lower peninsula. Lakeshore's service area is diverse, ranging from the economically depressed city of Detroit to Michigan's rural "thumb" region. Recognized as a pioneer in addressing domestic and sexual violence, Lakeshore has litigated thousands of complex civil cases on behalf of domestic violence and sexual assault clients in matters of child protection, custody, visitation, and divorce. In 2010, Lakeshore received the trailblazer award from the Michigan Coalition Against Domestic and Sexual Violence for the agency's innovative, collaborative approach to meeting the needs of domestic violence and sexual assault survivors in Michigan.

Legal Services-NYC

Legal Services-NYC has provided free civil legal services to poor people in all boroughs of New York City for over 40 years. In addition to representing individual clients, it provides continuing legal educa-

tion and consultation to the public interest law community and participates in advocacy organizations, such as the Lawyers' Committee Against Domestic Violence. Legal Services-NYC has a long history of providing high quality legal representation to victims of domestic violence in cases involving orders of protection, child custody, visitation, child support and divorce. Legal Services-NYC has an equally long history in representing poor parents in child protective proceedings. Between its citywide Keeping Families Together program and its Brooklyn Family Defense Project, Legal Services-NYC assists over 1100 families a year, including nearly half the parents in Brooklyn charged with neglect or abuse. Legal Services-NYC lawyers and advocates also are involved in numerous policy and advocacy efforts directed at improving justice for parents and children in the Family Court and child welfare system.

Life Span

Life Span provides comprehensive legal and social services to victims of domestic and sexual violence and their children in Chicago and its suburbs. In operation since 1978, the lawyers, counselors, and advocates at Life Span help 3,500 clients annually. The agency's lawyers specialize in representing victims in complicated family law matters, including custody and visitation, divorce, and orders of protection. Life Span assists hundreds of battered women and their children each year who have come under the jurisdiction of the Illinois Department of Children and Family Services because they are victims of domestic violence. Life Span also engages in systemic advocacy and policy work with a goal of im-

proving the response of the legal system to victims of domestic and sexual violence.

My Sisters' Place, Inc.

A nonprofit organization formed in 1978, My Sisters' Place is the leading resource in Westchester County, New York, and the surrounding regions in the field of domestic violence and human trafficking programming, advocacy, and legal services. Throughout its history, My Sisters' Place has offered a holistic approach to the many and varied needs of domestic violence victims, including safety, supportive healing services, economic opportunity, and housing. Its programs include two residential shelters, individual counseling and advocacy, children's programs, support groups, a legal center, life skills training, school-based domestic violence prevention education, and outreach programs. Founded in 1997, the full-service Legal Center of My Sisters' Place provides legal advice, counsel, and representation to domestic violence victims in family law matters and in the areas of immigration, employment, and government benefits.

National Advocates For Pregnant Women

National Advocates for Pregnant Women ("NAPW") is a nonprofit organization that works to ensure the human and civil rights, health, and dignity of pregnant and parenting women while protecting children from counterproductive and misguided state policies. NAPW advocates for reproductive and family justice, including the right to carry a pregnancy to term, access to culturally-appropriate and

evidence-based medical care, and the rights of parents and children to family integrity undisrupted by inappropriate state action. NAPW helped represent plaintiffs in *Ferguson v. City of Charleston* and joins this case as amicus because of the harm to parents, children, and family life if Fourth Amendment protections are denied in the guise of protecting children.

National Coalition Against Domestic Violence

The National Coalition Against Domestic Violence ("NCADV"), founded in 1978 and incorporated in the state of Oregon, is a national nonprofit that provides general information, referrals, and technical assistance to domestic violence service providers and serves as the primary representative of battered women and their children in the public policy arena. NCADV is extremely concerned about the potential relaxing of Fourth Amendment rights of a victim, regardless of where that victim is questioned. Through its work on national domestic violence advocacy, NCADV knows that many battered women and their children face injustices as a result of policies and practices carried out by agencies that are supposed to help and protect them. Victims of domestic violence must be afforded their rights during questioning, just as the alleged perpetrator has rights when questioned. If those rights are waived or relaxed for the victims, their personal safety is often comprised.

New York Legal Assistance Group

Founded in 1990, the New York Legal Assistance Group ("NYLAG") is a nonprofit organization dedi-

cated to providing free civil legal services to New York's low income families. In 1994, NYLAG established its Domestic Violence Initiative which provides assistance to victims of domestic violence on a priority basis. In addition to obtaining orders of protection, the Initiative provides victims with legal representation in child protection, custody, visitation, support and matrimonial matters. NYLAG has further demonstrated its commitment to promoting legal services for victims of domestic violence through its Domestic Violence Clinical Center ("DVCC"). The DVCC is an innovative program administered and supervised by NYLAG attorneys, which offers law students the opportunity to learn the substantive and litigation skills necessary to provide exceptional representation to battered women.

Sharwline Nicholson

Sharwline Nicholson is a mother and a domestic violence survivor who has experienced first-hand the devastation child protective services agencies can cause through overly aggressive, unreasonable interventions in cases involving domestic violence. Her experience is discussed in more detail in the argument below. In 1999, after an incident in which Ms. Nicholson was badly beaten by her daughter's father, the New York City Administration for Children's Services ("ACS") removed her eight-year-old son and three-year-old daughter to foster care. They did so even though they had no reason to believe that Ms. Nicholson was neglectful or that the children would be harmed in her care. The children remained in foster care, where they were mistreated, for three

weeks. Ms. Nicholson subsequently became the named plaintiff in the landmark case of *Nicholson v. Williams*, a class action suit which challenged ACS's policy and practice of presumptively removing children from non-offending battered mothers as a violation of their mothers' constitutional rights. The case ultimately established that battered mothers cannot be found guilty of neglect merely because their children have witnessed violence. Following her success, Ms. Nicholson has spoken at domestic violence conferences and colleges and has been active in several organizations in New York City, including the Child Welfare Organizing Project and the Child Welfare Watch.

University Of Baltimore Family Law Clinic

The University of Baltimore Family Law Clinic provides representation for residents of the Baltimore community in a range of family law matters. The Clinic has focused on the needs of women subjected to abuse and their children, representing them in protective order, divorce, custody and child support proceedings and assisting them in understanding and using the criminal sanctions applicable when their partners' actions violate the criminal law. Because of their interactions with the criminal system and child protective services, the Clinic's clients are potentially at risk for the kinds of custodial interrogation involved in *Camreta & Alford v. Greene*.

SUMMARY OF ARGUMENT

The seizure and interrogation of a child or any person believed to have suffered abuse is highly intrusive and can have disastrous consequences for the individual and her family. In arguing that the state should have maximum flexibility in child protection investigations, petitioners unjustifiably assume that state intervention is likely to help children. Yet, in reality, despite the good intentions of child protective services ("CPS") and law enforcement personnel, their intervention in cases of suspected intra-family abuse can put victims at risk of greater danger. The risk that state intervention will damage children and families is particularly acute in cases in which child protection concerns overlap with domestic violence against a parent or guardian.

Allegations of child abuse and neglect frequently arise in families in which domestic violence against a parent or guardian also occurs. In the context of domestic violence, there is a substantial risk that state intrusions on the rights of children and parents will be unreasonable—*i.e.*, they will significantly interfere with rights without serving the state's interest in protecting victims. In domestic violence cases, state intervention may actually endanger the mother and child by prompting the batterer to intensify his violence and increase other forms of coercive control. Moreover, in the context of domestic violence (or suspected domestic violence), the judgment of CPS and law enforcement agents is likely to be clouded by unwarranted beliefs that battered mothers will not protect their children. When dealing with the complex dynamics of domestic violence, poorly trained,

overworked and overzealous CPS and law enforcement agents easily can fail to recognize when state intervention is (or is not) reasonably necessary and appropriate to protect children. For these reasons, the Fourth Amendment's protections against arbitrary state interference with children's and parents' rights are particularly important. To protect these rights, the Fourth Amendment's traditional requirements for a warrant and probable cause provide a necessary check on the discretion of CPS and law enforcement agents.

Given the intrusiveness of CPS/law enforcement investigations of intra-family abuse and the high risk that state interventions will be damaging and ineffective, the Court should decline petitioners' invitation to create a lesser standard of Fourth Amendment protection for suspected child abuse victims. There is no basis in precedent or logic for a ruling that suspected victims or witnesses of crime are entitled to less freedom from governmental intrusions than suspected perpetrators. Undoubtedly, petitioners are correct that the government's interest in protecting children is compelling. However, "the gravity of the threat alone cannot be dispositive of questions concerning what means [state agents] may employ to pursue a given purpose." *Indianapolis v. Edmond*, 531 U.S. 32, 42 (2000). The Fourth Amendment also requires consideration of the harms the intervention may cause as well as the likelihood that the intervention will serve the state's interest.

Furthermore, if the Court condones the seizure and interrogation of S.G., a suspected child abuse victim, without a warrant, probable cause, parental

consent, or exigent circumstances, it will pave the way for relaxing Fourth Amendment rights in circumstances beyond those of the instant case. That is because, if accepted by this Court, the rationales on which petitioners wrongly rely to justify S.G.'s seizure would apply equally to--and, therefore, could be used to justify--seizures in other factual settings. For example, under petitioners' flawed reasoning, because children may be harmed by witnessing domestic violence, CPS and law enforcement agents would be justified in seizing and interrogating children believed to have been exposed to domestic violence, even when those children have not themselves been abused. By logical extension, in certain circumstances in which adults have reduced expectations of privacy, petitioners' faulty rationales also would justify investigatory seizures of battered mothers without a warrant, probable cause or consent. Such expansions of state powers in circumstances not directly presented by this case are possible if suspected abuse victims are afforded anything less than the full protection of the Fourth Amendment.

ARGUMENT

I. There Is A Significant Risk That The State Will Unreasonably Invade The Rights Of Abuse Victims, Particularly In Cases Involving Domestic Violence.

A. State Intervention Often Causes Greater Harm.

Although the state has an interest in protecting people from violence, the responses of CPS and law enforcement agents, in actuality, often increase violence in the home and put victims in greater danger, thereby thwarting the state's interest in protection. Despite the best intentions of state agents, their involvement in situations of intra-family abuse can harm and re-victimize victims. *See* New York State Judicial Committee on Women in the Courts, *Women in the Courts: A Work in Progress* 26 (2002); Doriane Lambelet Coleman, *Storming The Castle To Save The Children: The Ironic Costs Of A Child Welfare Exception To The Fourth Amendment*, 47 Wm. & Mary L. Rev. 413, 417–419 (2005). In many cases of child abuse and neglect, a parent—typically the mother—is a victim of violence by her intimate partner.[2] Evan Stark, *The Battered Mother in the Child*

---

[2] There is considerable overlap between child protection and domestic violence cases. Although domestic violence is likely significantly underreported, "even the lowest estimates of its prevalence indicate that domestic violence is more often an issue in child protection cases than is substance abuse, homelessness, mental illness or other comparable problems to which considerably greater resources are devoted." Stark, *The Bat-*

Protective Service Caseload: Developing an Appropriate Response, 23 Women's Rts. L. Rep. 107, 109 (2002) [hereinafter Stark, *The Battered Mother*] ("[d]omestic violence against the mother is a common, and may be the single most common, context for child abuse or neglect."). In such cases, a victim's report of abuse to the state may trigger intensified violence and increase other forms of coercive control, such as intimidation, surveillance, degradation, and isolation of the mother from outside sources of support. Peter G. Jaffe, Nancy K.D. Lemon, & Samantha E. Poisson, *Child Custody & Domestic Violence: A Call for Safety and Accountability* 29 (2003); National Council of Juvenile & Family Court Judges, *Effective Intervention in Domestic Violence and Child Maltreatment Cases: Guidelines for Policy and Practice* 66 (1999); Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* 228–229 (2007) [hereinafter Stark, *Coercive Control*]; V. Pualani Enos, *Recent Development: Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 Harv. Women's L.J. 229, 243–244 (1996); Deborah Tuerkheimer, *Exigency*, 49 Ariz. L. Rev. 801, 817 (2007). And when the state intervenes—for example, by arresting batterers or issuing orders of protection—in many cases, it fails to protect victims and their children from further violence. *See* Adele Harrell & Barbara E. Smith, *Effects of Restraining Orders on Domestic Violence Victims*, *in Do Arrests and Restraining Orders Work* 214, 218 (Eve S. Buzawa & Carl G. Buzawa

---

tered Mother at 111–112; *see also* National Council of Juvenile & Family Court Judges, *supra*, at 9.

eds., 1996); Patricia Tjaden & Nancy Thoennes, *Extent, Nature and Consequences of Intimate Partner Violence* 52 (2000) (reporting study findings that only 7.3% of physical assaults, 7.5% of rapes, and 14.6% of stalking cases involving intimate partners were prosecuted); Charles L. Diviney *et al.*, *Outcomes of Civil Protective Orders: Results From One State*, J. Interpersonal Violence, 2009, at 1209–1221; T.K. Logan *et al.*, *Protective Orders: Questions and Conundrums, Trauma, Violence, and Abuse*, 2006, at 175, 191 (reporting analysis of thirty-two studies finding that about 40% of protective orders were violated); Ann Malecha *et al.*, *Applying for and Dropping a Protection Order: A Study with 150 Women*, Crim. Just. Pol'y Rev., 2003, at 486, 492; David Owens, *West Hartford Man Arrested Three Times on Domestic Violence Charges*, Hartford Courant (June 1, 2010), *available at* http://articles.courant.com/2010/jun/01 (follow "West Hartford Man Arrested Three Times on Domestic Violence Charges" hyperlink).

In addition, the disclosure of violence may prompt state action to remove children from their non-abusive, battered mothers, even where the children have not been directly abused, but have merely witnessed their mother's battering.[3] New York State

[3] The threat that the state will take a battered mother's children if she reports her abuse serves to reinforce the batterers' control by discouraging her from seeking help. This is another means by which the CPS system, ironically, creates greater danger for domestic violence victims and their children. In fact, batterers often threaten to call CPS and have the children removed as a means of exerting control over the mothers. Stark, *Coercive Control* at 251.

Judicial Committee on Women in the Courts, *supra*, at 27; G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 Harv. Women's L.J. 89, 91–92 (1999); *see also* discussion *infra* Part I.C. While exposure to domestic violence may cause some children physical, emotional, and behavioral problems, studies show that the vast majority of children who witness such abuse suffer no negative effects.[4] Stark, *The Battered Mother* at 116; *see also Nicholson v. Williams*, 203 F. Supp. 2d 153, 197 (E.D.N.Y. 2002); National Council of Juvenile & Family Court Judges, *supra*, at 10. The removal of children in these situations is especially harmful because the bond between the non-offending parent and her child is crucial to the child's resiliency. *Nicholson*, 203 F. Supp. 2d at 198–199; *see also* American Psychological Association, *Violence and the Family* 124 (1996); Lundy Bancroft & Jay G. Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* 104 (2002). Importantly, the removal of children is likely unwarranted because non-abusive battered mothers are, in general, highly capable parents. *See* Stark,

---

[4] The degree to which children may be harmed by witnessing domestic violence depends on a variety of factors including the child's age, the level of violence witnessed by the child, other stressors in the child's life and the child's relationship to the victim. *Nicholson*, 203 F. Supp. 2d at 197 (discussing expert testimony). Moreover, when children are harmed by witnessing domestic violence, the harm often does not rise to a level where governmental intervention is justified. Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment*, 53 Hastings L.J. 1, 34 (2001).

The Battered Mother at 112; Weithorn, *supra*, at 33. Thus, in the groundbreaking "Green Book," which was the first systematic effort at a national level to develop guidelines for child protection cases involving domestic violence, the National Council of Juvenile & Family Court Judges recommends that children affected by abuse, neglect, or domestic violence be kept with their non-offending parents whenever possible. National Council of Juvenile & Family Court Judges, *supra*, at 14.

B. Due To Misconceptions And Biases, State Systems Inappropriately Punish And Re-Victimize Non-Offending Battered Mothers.

Scholars, legal practitioners, advocates, and courts have recognized that, instead of providing help and needed support, state systems designed to protect victims of domestic violence frequently punish and re-victimize them. *Nicholson*, 203 F. Supp. at 200–201, 211 (discussing policies and practices that blame victimized mothers and fail to hold abusers accountable); Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. Rev. 577, 587–588 (1997); Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 11 Yale J.L. & Feminism 3, 17 (1999); Bonnie E. Rabin, *Symposium on Reconceptualizing Violence Against Women by Intimate Partners: Critical Issues: Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 Alb. L. Rev. 1109, 1110–1111 (1995). Due to inadequate training,

cultural norms that hold mothers primarily responsible for the care of children, institutional biases, and victim stereotypes, "[w]hen domestic violence is identified, punitive labels and interventions are more likely to be applied than in cases involving comparable harms to children where no domestic violence has occurred." Stark, *The Battered Mother* at 110; *see also* Miccio, *supra*, at 116–118 (discussing effects of gender bias on legal system's treatment of battered mothers). Despite evidence that domestic violence victims are likely to be high-functioning and capable parents, battered mothers are generally presumed incapable of protecting themselves or their children. Stark, *The Battered Mother* at 112; *see also* National Council of Juvenile & Family Court Judges, *supra*, at 11.

Presuming that children exposed to domestic violence are at risk of serious harm and that battered mothers will not protect their children, CPS and law enforcement agents often fail to adequately assess the actual risk and, instead, assume that aggressive intervention is necessary. National Council of Juvenile & Family Court Judges, *supra*, at 21–22. In addition to removing children from their non-abusive mothers, the state may leverage its child protective authority to force domestic violence victims to take actions it deems appropriate—such as, cooperation with possibly inappropriate or ineffective service plans, leaving the abuser, obtaining orders of protection, and participating in the prosecution of the batterer.[5] *See, e.g., Nicholson*, 203 F. Supp. 2d at 216

[5] The choices of battered women—for example, to stay with their abusers and to resist state intervention—may seem irra-

(finding that ACS needlessly protracts return of children to non-offending abused mothers "due to pique of the ACS employee or to the employee using bureaucratic power to punish the mother and child until the mother becomes pliant to ACS orders—even though the ACS demands may not be necessary to protect the children."). Laws mandating arrest of batterers and no-drop prosecution policies further deny victims control without necessarily increasing safety. Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 Fla. St. U. L. Rev. 1, 32–43 (2009); David Hirschel, Eve Buzawa, April Pattavina, & Don Faggiani, *Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions*, 98 J. Crim. L. & Criminology 255, no. 1, 255, 255 (2007). As explained by Professor Deborah Epstein, "[i]n many cases, prosecutors take complete control over the case, functioning as the sole decision-maker and ignoring the victim's voice. . . . Such re-victimization can thwart the survivor's efforts to regain control over

---

tional or even pathological if considered without proper understanding of the dilemmas these women face. A battered mother may choose to stay with an abusive partner and to resist state assistance for a variety of rational reasons, including fear of retaliation, fear that the state will take her children away, economic dependence on the abuser, lack of safe alternative housing, risk that an immigrant abuser will be deported, and religious or cultural reasons. National Council of Juvenile & Family Court Judges, *supra*, at 11; Enos, *supra*, at 245–246; Epstein, *supra*, at 17-18. When the state fails to take victims' concerns seriously, and instead forces victims to comply with its plans, the state paradoxically may jeopardize the safety and security of battered mothers and their children.

her life and move past the abusive experience." Epstein, *supra*, at 17. Such paternalistic approaches to domestic violence ignore the ways in which victims make autonomous, rational, and protective choices within the constraints of their circumstances. Goodmark, *supra*, at 27–29; Stark, *The Battered Mother* at 125–126.

C. Child Protective Services Agents Have Overstepped Constitutional Bounds In Cases Involving Domestic Violence.

The case of *amicus curiae* Sharwline Nicholson provides a useful illustration of the danger that CPS will overstep constitutional limits in cases involving domestic violence. *See Nicholson*, 203 F. Supp. at 153; *Nicholson v. Scoppetta*, 3 N.Y.3d 357, 820 N.E.2d 840 (N.Y. 2004). In that class action litigation, the Eastern District of New York found that the City of New York's Administration for Children's Services ("ACS") engaged in "widespread and unnecessary cruelty" and violated substantive and procedural due process rights by removing children from the care of non-abusive battered mothers on the presumption that the children's exposure to the mother's abuse constituted neglect. 203 F. Supp. 2d at 163, 251. In Ms. Nicholson's personal situation, ACS took her three-year-old daughter and eight-year-old son into state custody following an incident in which Ms. Nicholson was beaten and seriously injured by her daughter's father, Mr. Barnett. *Id.* at 169. This was the first and only time that Ms. Nicholson had been beaten by Mr. Barnett, who lived in another state. *Id.* Even though the ACS case-

worker knew that he did not have legal authorization to keep the children in custody, he testified "that he was hoping Ms. Nicholson would cooperate with his demands in order to avoid going to court." *Id.* at 170. He further explained that it was common to wait a few days before seeking a court order for removal "because, after a few days of the children being in foster care, the mother will usually agree to ACS's conditions for their return without the matter ever going to court." *Id.* Although he had no evidence that Ms. Nicholson's children would be subjected to repeated incidents of violence, and even though he did not believe that Ms. Nicholson was neglectful, the caseworker "hoped that 'once she got before the Judge, that the Judge would order her to cooperate with realistic services to protect herself and the two children.'" *Id.* at 171 (quoting testimony). Ms. Nicholson was separated from her children for 21 days and ordered to cooperate with ACS supervision until it eventually dismissed its neglect petition seven months later. *Id.* at 172–173.

Ms. Nicholson's experience was not unique. Although the court held that the ACS policy of presumptively removing children from non-abusive battered mothers was unconstitutional and ordered its discontinuation, *id.* at 251, the case reveals systemic disregard in the child welfare system for the rights of domestic violence victims. The disregard for victims' rights and use of overly aggressive tactics that *Nicholson* so thoroughly documents are not isolated to that case or New York. Rather, similar tactics, which re-victimize battered mothers and their children, are routinely observed by *amici curiae* in myriad subtle and not-so-subtle forms. As *Nicholson*

demonstrates, given the many factors which can cause well-meaning CPS and law enforcement agents to undervalue and infringe victims' rights, Fourth Amendment safeguards are especially important.

II. Given The Risk Of Unreasonable State Intrusions, Victims And Witnesses Of Abuse Are Entitled To Full Fourth Amendment Protection.

A. The Fourth Amendment's Concerns With Preventing Arbitrary Government Intrusions Are Particularly Relevant In Cases Involving Domestic Violence.

Given the potentially severe consequences of state interventions in cases of suspected intra-family violence and the likelihood for state agents to violate constitutional limits, the Fourth Amendment requires safeguards to ensure that searches and seizures are not conducted arbitrarily. The "cardinal principle" of Fourth Amendment jurisprudence is that searches and seizures "conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). As the Court explained in setting out the balancing test for assessing the reasonableness of seizures "less intrusive than a traditional arrest":

> A central concern in balancing these competing considerations in a variety of settings has been to assure that an individual's reason-

> able expectation of privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field. To this end, the Fourth Amendment requires that a seizure must be based on specific, objective facts indicating that society's legitimate interests require the seizure of the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers.

Brown v. Texas, 443 U.S. 47, 50–51 (1979); *see also Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) ("The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."). In this scheme, the probable cause standard "reflects the benefit of extensive experience accommodating the factors relevant to the 'reasonableness' requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule." *Dunaway v. New York*, 442 U.S. 200, 213 (1979) (citation omitted). Furthermore, the warrant requirement serves a crucial purpose in ensuring that the rights of the individual are not "subject to the discretion of the official in the field." *Camara*, 387 U.S. at 533.

The constitutional imperative to restrain the discretion of agents in the field has particular relevance in cases involving child welfare and domestic violence. As the National Council of Juvenile & Family Court Judges has recognized:

> Because domestic violence encompasses a wide range of behaviors—from the extremely dangerous to the less serious—families require a range of interventions, some of them voluntary and some mandated. To create safety and stability for families requires careful assessment of risk and the capacity to make differential responses.

National Council of Juvenile & Family Court Judges, *supra*, at 24. The Fourth Amendment's requirements for probable cause and review by a judicial officer are critical to ensure that risks are carefully assessed and appropriate responses identified, particularly because pervasive biases and misconceptions are so likely to affect the judgment of CPS and law enforcement agents in these cases.

B. Nothing In The Court's Jurisprudence Suggests That Witnesses And Victims Are Entitled To Less Protection Under The Fourth Amendment.

Had S.G. been suspected of committing a crime, her seizure and custodial interrogation in a room she was not free to leave without valid consent or exigent circumstances would have required a warrant supported by probable cause. *See Florida v. Royer*, 460 U.S. 491, 496 (1983). Yet, because she was suspected of being a victim and a witness, rather than a criminal, petitioners argue that those traditional Fourth Amendment protections did not apply. "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Camara*, 387 U.S. at 530. Indeed,

nothing in this Court's jurisprudence supports the notion that the Fourth Amendment affords innocent victims or witnesses less protection from government intrusion than persons suspected of committing crime.

Petitioners wrongly assert that, under the Court's decision in *Illinois v. Lidster*, 540 U.S. 419 (2004), the Fourth Amendment requirements for a warrant and probable cause have no application when a person who is seized for the purpose of gathering information is not suspected of wrongdoing. (*See* Petr. Alford's Br. 23–25; Petr. Camreta's Br. 19–21.) The Court made no such ruling. In *Lidster*, the Court addressed only the circumstances of the seizure at issue, in which police briefly stopped all motorists passing by the location of the hit-and-run accident. It said nothing about the applicability of individualized suspicion to seizures like the one in this case, in which a particular individual was seized and interrogated for two hours precisely because she was suspected of being an abuse victim.

Moreover, the *Lidster* ruling is inapposite here because, in finding that the traffic stops were constitutional, the *Lidster* Court repeatedly emphasized that they were brief and minimally intrusive. *Lidster*, 540 U.S. at 425–427. In contrast, where the person seized by the state is potentially a victim as well as a witness of abuse, the intrusion on liberty caused by a warrantless, nonconsensual custodial interrogation is vastly greater than the intrusion caused by a brief traffic stop. The degree of intrusiveness is evaluated both objectively—as "measured by the duration of the seizure and the intensity of

the investigation"—and subjectively—in terms of the potential for "generating of concern or even fright." *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 452 (1990) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976)); *see also Lidster*, 540 U.S. at 427 (discussing objective and subjective intrusions). On both measures, the seizure of S.G. in this case—and of suspected victims of abuse generally—is highly intrusive. The brief traffic stops at issue in *Lidster* are also distinguishable because, once they ended, the motorists' lives resumed, presumably unaffected by their interaction with the police. In contrast, as occurred with S.G. and her sister (J.A. 65–68, 70–73), the state's seizure and interrogation of a suspected child abuse victim will frequently mark just the beginning of an ongoing intrusion into the individual's life, that may include repeated interviews, physical exams, and placement in foster care.

These intrusions often are not helpful, and they are not benign. As demonstrated in *Nicholson*, CPS's response can be inappropriately drastic and result in negative long-lasting consequences. The harm caused to children when they are needlessly separated from their non-offending parent through placement in foster care cannot be overstated. Further, interrogations of children, and of their battered mothers, may unleash harm to a non-offending parent. Had S.G.'s father been violent, which was not alleged here, the interrogation—without background investigation to first determine whether there was a potential concern of violence—could have triggered violence towards other members of the household, ironically harming rather than protecting children and family members from abuse.

III. Relaxing Fourth Amendment Standards For Child Protection Investigations Will Diminish Fourth Amendment Rights In Domestic Violence Investigations.

Petitioners argue that the custodial interrogation of a suspected child abuse victim without any of the traditional Fourth Amendment requirements—*i.e.*, a warrant, probable cause, parental consent, or exigent circumstances—is reasonable because the state's strong interest in child protection and lack of practical alternatives outweighs the purportedly minimal privacy interests of children in public school. (Ptr. Alford's Br. 36–53; Ptr. Camreta's Br. 10–11, 24–34.) None of petitioners' stated reasons justifies deviating from traditional Fourth Amendment requirements. However, if the Court accepts petitioners' reasoning and creates a lesser standard of Fourth Amendment protection for the seizure of S.G. in this case, it will open the door to diminished Fourth Amendment rights in other circumstances. In particular, the justifications petitioners offer to excuse the seizure of S.G. would logically extend to seizures in other circumstances where children are *not* suspected victims of abuse, but where the state maintains a strong interest in the child, in law enforcement, or in some other social good. For instance, because children who witness domestic violence may be harmed, *see* discussion *supra* Part I.A., there is no rational reason why these proffered justifications would not permit the state to seize and interrogate a child who is not herself abused, but is a witness to violence against a parent. Nor is there a logical limit in petitioners' reasoning to prevent the state from seizing and interrogating an adult victim of domestic vio-

lence in certain circumstances in which her expectations of privacy are reduced.

Petitioners (wrongly) rely on the following purported grounds for a reduced Fourth Amendment standard in this case: (1) the state's strong interest in child protection (Ptr. Alford's Br. 36–39; Ptr. Camreta's Br. 24–26); (2) the difficulty of establishing probable cause where the victim may be the only witness (Ptr. Alford's Br. 41; Ptr. Camreta's Br. 11, 26–28); (3) the impracticality of obtaining a warrant due to the urgent need for protection (Ptr. Alford's Br. 44–46); and (4) reduced privacy expectations of victims (Ptr. Alford's Br. 50–53; Ptr. Camreta's Br. 30–33). Each of these rationales could be applied in cases of domestic violence. However, none of them legitimately justifies reduced Fourth Amendment protections.

With regard to the first rationale, the state's interest in child protection, as already discussed, may be implicated where a child is exposed to domestic violence. *See* discussion *supra* Part I.A. In cases of domestic violence, the state has additional important interests in protecting the adult victim and punishing the offender. *See Georgia v. Randolph*, 547 U.S. 103, 117 (2006) (recognizing that domestic violence is a serious problem). Yet, however compelling the state's interest may be, that alone cannot justify the investigatory seizure of a victim because the seizure is likely to be highly intrusive and damaging, and to actually *disserve* the state's interest.

Likewise, petitioners' argument that a probable cause standard is impractical in cases of suspected child abuse could also be made in situations of do-

mestic violence because both forms of abuse typically occur in private, the victims may be the only witnesses, and they may be reluctant to disclose their abuse. It is true that, for a variety of rational reasons, including fear of increased violence, many victims are reluctant to disclose their abuse. *See supra* note 5. However, petitioners have not established that this reluctance is so pervasive that the probable cause standard is *per se* infeasible. Even if a victim is unwilling to disclose the abuse, it may be possible to obtain probable cause through less intrusive means, such as voluntary interviews of other persons who may have relevant knowledge. Moreover, if a victim is truly unwilling to talk, there is little reason to believe that she will provide reliable information when seized and compelled to endure an interrogation. For these reasons, the difficulty of meeting a probable cause standard in some instances of suspected intra-family abuse cannot justify the erosion of Fourth Amendment rights in all such cases.

Similarly, petitioners' rationale that urgency makes it impractical to obtain a timely warrant could apply equally in domestic violence cases, as in cases of child abuse. *See, e.g., United States v. Brooks*, 367 F.3d 1128, 1136 (9th Cir. 2004) (finding domestic violence situations may present exigent circumstances permitting warrantless police entry); *Tierney v. Davidson*, 133 F.3d 189, 197 (2d Cir. 1998) (same); *State v. Greene*, 162 Ariz. 431, 433, 784 P.2d 257, 259 (Ariz. 1989) (same). However, the possibility that CPS and law enforcement officers may sometimes need to take action for the protection of abuse victims before they have time to obtain a warrant does not justify a departure from traditional Fourth

Amendment requirements in all cases because, where exigent circumstances truly exist, the Fourth Amendment already permits searches and seizures without a warrant. *See Brigham v. Stuart*, 547 U.S. 398, 403 (2006).

Finally, petitioners' argument that the seizure in this case was justified because schoolchildren have reduced expectations of privacy could be extended logically to circumstances in which adult victims of domestic violence subject themselves to diminished privacy rights by seeking help they need. Thus, there is a risk that the petitioners' rationale for allowing warrantless interrogations of children in schools may be used to justify coercive questioning of adult domestic violence victims in certain settings. For example, in some states, domestic violence victims who receive welfare may have reduced expectations of privacy in their own homes. *Wyman v. James*, 400 U.S. 309, 326 (1971) (holding that no Fourth Amendment privacy rights are violated where a state conditions the receipt of welfare benefits on consent to home visits); *Sanchez v. County of San Diego*, 464 F.3d 916, 922–923 (9th Cir. 2006) (same). In addition, Petitioner Camreta argues that statutes requiring public school personnel and certain other persons to report child abuse and neglect diminish children's legitimate expectations of privacy. (Ptr. Camreta's Br. 32–33.) If this premise is accepted by the Court, similar laws in states that require medical personnel to report domestic violence or, more generally, injuries by non-accidental, criminal or violent means, would likewise diminish the privacy expectations of domestic violence victims when they seek treatment for injuries. *See* T. Scalzo,

Reporting Requirements for Competent Adult Victims of Domestic Violence (April 21, 2006), http://www.usmc-mccs.org/famadv/ (follow "Restricted Reporting Resources" hyperlink; then follow "National Domestic Violence Reporting Requirements" hyperlink).

Given all of these parallels, a ruling exempting any form of child welfare investigatory seizure from the warrant and probable cause requirements has potential application in circumstances very different from S.G.'s seizure in this case.

CONCLUSION

In the event that the Court reaches the merits of this case, it should rule that a warrant (or comparable court order) supported by probable cause to believe that a child has been abused, parental consent, or exigent circumstances are required before child protective services or law enforcement agents may seize and interrogate suspected victims of child abuse. Such a rule is necessary to protect suspected victims of intra-family abuse from unreasonable, highly intrusive, and potentially damaging state interventions in their lives.

Respectfully submitted,

Lauren E. Handel
Counsel of Record
Malinda Morain
McDermott Will & Emery LLP
340 Madison Avenue
New York, NY 10173
(212) 547-5400
lhandel@mwe.com
mmorain@mwe.com

Attorneys for Amici Curiae

January 2011

FILED
DEC 17 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

JAMES ALFORD, Deschutes County Deputy Sheriff,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES, AND LEAGUE OF CALIFORNIA CITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

JOHN E.B. MYERS
Of Counsel
UNIVERSITY OF THE PACIFIC
MCGEORGE SCHOOL OF LAW
3200 Fifth Avenue
Sacramento, CA 95817
Phone: 916.739.7176
jmyers@pacific.edu

JOHN J. SANSONE
County Counsel
JOHN E. PHILIPS
Chief Deputy
GARY C. SEISER
Senior Deputy
Counsel of Record
OFFICE OF COUNTY COUNSEL
4955 Mercury Street
San Diego, CA 92111
Phone: 858.492.2550
Gary.Seiser@sdcounty.ca.gov
Counsel for Amici Curiae

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

453 C (45)

Additional Counsel:

JENNIFER B. HENNING
Litigation Counsel
CALIFORNIA STATE ASSOCIATION OF COUNTIES
1100 K Street, Suite 101
Sacramento, CA 95814
Phone: 916.327.7500
jhenning@coconet.org

PATRICK WHITNELL
General Counsel
LEAGUE OF CALIFORNIA CITIES
1400 K Street
Sacramento, CA 95814
Phone: 916.658.8281
pwhitnell@cacities.org

ANTECEDENT AND FAIRLY INCLUDED QUESTIONS PRESENTED

(1) Public school interviews of suspected child abuse victims are a vital tool for social workers and peace officers, allowing children to be contacted in a safe, neutral setting. Normally the interviews do not restrict the child's liberty any more than being in school does and do not intrude on the child's privacy beyond what the child is willing to tell. Absent egregious circumstances, when social workers or peace officers conduct public school interviews of suspected child abuse victims is the Fourth Amendment implicated?

(2) The Courts of Appeals are split regarding the standard for reviewing Fourth Amendment claims in child protection investigations. Determining the correct standard involves consideration of multiple interests, including children's right to be safe from abuse and neglect, which is a factor that should be considered in all Fourth Amendment analyses of child protection investigations. If the Fourth Amendment is implicated in a public school interview by a peace officer or a social worker of a suspected child abuse victim, should the traditional balancing test apply?

TABLE OF CONTENTS

Page

ANTECEDENT AND FAIRLY INCLUDED QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

THE *AMICI CURIAE* SUBMIT THIS BRIEF IN SUPPORT OF PETITIONERS 1

INTERESTS OF THE *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 7

I. ABSENT EGREGIOUS CIRCUMSTANCES, PUBLIC SCHOOL INTERVIEWS OF SUSPECTED CHILD ABUSE VICTIMS THAT ARE CONDUCTED BY A SOCIAL WORKER OR A PEACE OFFICER DO NOT IMPLICATE THE FOURTH AMENDMENT AT THEIR INCEPTION 7

A. This Issue Is Antecedent To And Fairly Included In The Issues Raised By Petitioners, And Thus The Court Can Address This Issue 7

B. The Court Should Address This Issue To Provide Clear Guidance For Future Cases 10

C. Absent Egregious Circumstances, Public School Interviews Of Suspected Child Abuse Victims That Are Conducted By Social Workers Or Peace Officers Do Not Implicate The Fourth Amendment 11

TABLE OF CONTENTS – Continued

Page

1. The Presence of a Peace Officer Does Not Automatically Mean a Public School Interview is a Seizure..... 11

a. Peace Officers Have a Legitimate Role in the Protection of Children 12

b. Not All Contacts With Peace Officers Are Fourth Amendment Seizures..... 16

2. To Implicate the Fourth Amendment, a Public School Interview of a Suspected Child Abuse Victim Must Limit the Child's Freedom of Movement Significantly Greater Than in Everyday Compulsory Attendance 19

3. A Public School Interview of a Suspected Child Abuse Victim is Not an Interrogation 20

D. Absent Egregious Circumstances, A Public School Interview Of A Suspected Child Abuse Victim Does Not Implicate The Fourth Amendment At Its Inception 21

II. IF THE FOURTH AMENDMENT IS IMPLICATED IN A PUBLIC SCHOOL INTERVIEW OF A SUSPECTED CHILD ABUSE VICTIM THAT IS CONDUCTED BY A PEACE OFFICER OR SOCIAL WORKER, THE TRADITIONAL BALANCING TEST SHOULD APPLY..... 22

TABLE OF CONTENTS - Continued

Page

A. Children Have A Right And A Compelling Interest To Be Safe From Abuse And Neglect 23

B. Children's Right And Compelling Interest To Be Safe From Abuse And Neglect Is A Factor That Should Be Considered In All Fourth Amendment Analyses Of Child Protection Investigations..... 26

C. Viewing An Actual Case Through A Requirement For A Warrant, Court Order, Parental Consent, Or Exigent Circumstances Shows The Dangers The Ninth Circuit's Approach Causes..... 28

CONCLUSION 33

TABLE OF AUTHORITIES

Page

CASES

Alejo v. City of Alhambra, 75 Cal. App. 4th 1180 (Cal. Ct. App. 1999) 14

Arcadia v. Ohio Power Co., 498 U.S. 73 (1990) 8

Bunting v. Mellen, 541 U.S. 1019 (2004) 10

Capital Cities Cable v. Crisp, 467 U.S. 691 (1984) 8

Couture v. Bd. of Educ. of the Albuquerque Pub. Schs., 535 F.3d 1243 (10th Cir. 2008) 20

DeShaney v. Winnebago County Dep't of Social Services, 489 U.S. 189 (1989) 28

Florida v. Bostick, 501 U.S. 429 (1991) 12, 16, 17, 18

Gates v. Tex. Dep't of Protective & Regulatory Servs., 537 F.3d 404 (5th Cir. 2008) 24, 26, 27

Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) 7

Graham v. Florida, 130 S. Ct. 2011 (2010) 26

Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009) ..... *passim*

Immigration & Naturalization Service v. Delgado, 466 U.S. 210 (1984) 16, 18

In re Gault, 387 U.S. 1 (1967) 26

Kolstad v. American Dental Association, 527 U.S. 526 (1999) 7

TABLE OF AUTHORITIES – Continued

Page

New Jersey v. T.L.O., 469 U.S. 325 (1985) 19

Pennsylvania v. Ritchie, 480 U.S. 39 (1987) 22

People v. Assad, 189 Cal. App. 4th 187 (Cal. Ct. App. 2010) 28, 29, 30, 31, 32

Rhode Island v. Innis, 446 U.S. 291 (1980) 21

Roper v. Simmons, 543 U.S. 551 (2004) 26

Saucier v. Katz, 533 U.S. 194 (2001) 8, 10

Spiering v. Heineman, 448 F.Supp.2d 1129 (D.Neb. 2006) 25

Teague v. Lane, 489 U.S. 288 (1989) 8

Terry v. Ohio, 392 U.S. 1 (1967) 12

United States v. Drayton, 536 U.S. 194 (2002) 18

United States v. George, 960 F.2d 97 (9th Cir. 1992) 32

United States v. Provost, 969 F.2d 617 (8th Cir. 1992) 32

Vance v. Terrazas, 444 U.S. 252 (1980) 7, 8

Vernonia Sch. Dist. 47j v. Acton, 515 U.S. 646 (1995) 19

Wallace by Wallace v. Batavia Sch. Dist. 101, 68 F.3d 1010 (7th Cir. 1995) 19

TABLE OF AUTHORITIES – Continued

Page

RULES

California Rules of Court
Rule 5.674(b) 15
Rule 5.676(b) 15

United States Supreme Court Rules
Rule 14(1)(a) 7
Rule 37.6 1

STATUTES

California Penal Code
Section 11166.3, subdivision (a) (West 2010) 13
Section 11165.7, subdivisions (a)(19) & (34) (West 2010) 15
Section 11174.3, subdivision (a) (West 2010) 14
Section 13517 (West 2010) 13

California Statutes Chapter 916, Section 34 (2000) (Cal. Assemb. 1241), available at http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_1201-1250/ab_1241_bill_20000929_chaptered.html (last visited Dec. 14, 2010) 14

California Welfare and Institutions Code
Section 305, subdivisions (a), (b) & (d) (West 2010) 15
Section 355 subdivision (c)(1)(C) (West 2010) 15

TABLE OF AUTHORITIES – Continued

Page

OTHER

Eugene Gressman et al., Supreme Court Practice (9th ed. 2007)
Section 6.26(d) 8
Section 13.4 8

John E.B. Myers, *Child Protection in America: Past, Present, and Future* (2006) 13

John E.B. Myers, *Evidence in Child Abuse and Neglect Cases* (3d ed. 1997) 23

John E.B. Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases* (2005)
Section 7.01 23

The Declaration of Independence para. 2 (U.S. 1776) 7, 24

THE *AMICI CURIAE* SUBMIT THIS BRIEF IN SUPPORT OF PETITIONERS

The California State Association of Counties, and the League of California Cities respectfully submit this brief as *amici curiae* in support of Petitioners.

INTERESTS OF THE *AMICI CURIAE*[1]

The California State Association of Counties (CSAC) is a nonprofit corporation, the membership of which consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case involves issues affecting all California counties.

The League of California Cities (League) is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents,

[1] The parties have consented to the filing of *amicus* briefs in support of either party or of neither party. Pursuant to this Court's Rule 37.6, this brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *amici curiae* made a monetary contribution to this brief's preparation or submission.

and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide – or nationwide – significance. The Committee has identified this case as being of such significance.

As representatives of California counties and cities, the *amici* have a compelling interest in ensuring the safety of children. The Ninth Circuit decision in this case is already having a significant adverse impact on child protection investigations and, if allowed to stand, is likely to have even greater effect. As such, the *amici* submit this brief in support of the Petitioners.

SUMMARY OF ARGUMENT

Child abuse and neglect is a national problem. Every school day thousands of children throughout this nation are interviewed in their schools regarding possible abuse and neglect. In many communities social workers take the lead in such investigations. In others, law enforcement does. In both, there is recognized value in limiting the number of interviews conducted of a suspected child abuse victim. These interviews are often conducted under the authority of state laws that recognize abused and neglected

children are most likely to answer interview questions honestly when they feel safe, such as at their schools; that interviewing children at their schools does not involve the privacy interests involved with at home interviews; and that the need to protect children from abuse and neglect is a compelling state and national interest.

This case arises from a public school interview of a nine-year-old suspected child abuse victim, S.G., whose father had been arrested for molesting another child, F.S. The interview was conducted by a social worker and observed by a peace officer. The facts regarding this interview at its inception provide the canvas for the legal issues this Court will address: determining the proper test for analyzing Fourth Amendment claims involving public school interviews by peace officers and social workers of suspected child abuse victims, outlining the many factors and interests that need be considered in such analyses, and considering whether temporary detentions of suspected child abuse victims for the purpose of public school interviews in cases such as this are normally reasonable at their inception under the traditional balancing test.

The *amici* support the arguments made by the Petitioners in their Briefs on the Merits, but write separately here to address two points not fully addressed by the Petitioners or the Ninth Circuit Court of Appeals, yet critical to a complete analysis of the issues on which this Court has granted certiorari. The first is whether at the inception of the interview there was a Fourth Amendment seizure. The second

is that a child's right to be safe from abuse and neglect is a compelling interest that must be considered in all Fourth Amendment analyses of child protection investigations. Whether there was a seizure is an antecedent question, and both are fairly included questions within those presented by the Petitioners and on which certiorari was granted.

In addressing these two points the *amici* note that both Fourth Amendment seizure law and child protection investigations proceed along a continuum. Peace officers may have contact with members of the public that do not involve a seizure, they may stop and temporarily detain members of the public for questioning as possible witnesses or suspects, and they may arrest suspects for criminal activity. So, too, in child protection, peace officers and social workers may have contact with members of the public, including children, that do not involve a Fourth Amendment seizure, they may temporarily detain a child for a complete interview at a multi-disciplinary child advocacy center, and they may take a child into protective custody. The applicability of the Fourth Amendment, the nature of the public and private interests involved, and the tests for the protection of those interests, differ as the acts of the government official, whether peace officer or social worker, proceed along those continuums.

Was the interview of the nine-year-old suspected child abuse victim in this case that was conducted by the social worker and observed by the peace officer a seizure at its inception? The Ninth Circuit said yes

because a peace officer was involved, creating a *per se* rule that all public school interviews of suspected child abuse victims by law enforcement implicate the Fourth Amendment. The *amici* assert they do not.

The children interviewed in such cases are not suspected of wrongdoing; they are suspected of being victims. The interview is not designed to elicit incriminating evidence against the children, but to help identify if the children have been abused or neglected, and if so, to assess what level of protection, if any, is needed. As such, the *amici* ask this Court to reach the antecedent and fairly included question presented in this brief: Absent egregious circumstances, do public school interviews by peace officers or social workers of suspected child abuse victims implicate the Fourth Amendment at their inception?

If, however, the interview was a seizure at its inception, what Fourth Amendment test applies? Rejecting a "special needs" exception, the Ninth Circuit used the same test it has used for taking a child into protective custody: warrant, court order, parental consent, or exigent circumstances. It failed, however, to consider the continuum along which child protection investigations and Fourth Amendment protections proceed. The Ninth Circuit did not consider whether the public school interview of the suspected child abuse victim in this case was an investigative detention that fell short of taking the child into custody. Instead, it decided it was a seizure tantamount to an arrest, applying the same test it would apply if the child was arrested or physically

removed from the home and taken into protective custody. In this it erred.

The *amici* agree with the Petitioners that the traditional balancing test of reasonableness should apply in analyzing public school interviews that implicate the Fourth Amendment. We also agree with Petitioner Alford that a "special needs" exception is justified in public school interviews of suspected child abuse victims due to the government's compelling need to protect children from abuse and neglect and the minimal intrusion on the child's liberty. We assert, however, that no such special exception is needed; if the Fourth Amendment is implicated in a public school interview of a suspected child abuse victim, it will be a detention falling short of a full seizure, rather than the functional equivalent of an arrest.

In balancing the public and private interests involved in all Fourth Amendment analyses of child protection investigations, the *amici* assert there is an additional private interest the Ninth Circuit and most courts have failed to consider; children have a right to and a compelling interest in being safe from abuse and neglect. Is this a constitutional right to protect them from abuse and neglect by their parents? No. Instead, it is a liberty interest separate from the Constitution but implicitly recognized by our founding documents. And it is a compelling interest that children have that is as fundamental, self-evident, and unalienable to a child's liberty interests as the child's right to familial association and privacy,

perhaps more. *See* The Declaration of Independence para. 2 (U.S. 1776). The *amici* submit it must be considered in all Fourth Amendment analyses involving child protection investigations.

ARGUMENT

I. ABSENT EGREGIOUS CIRCUMSTANCES, PUBLIC SCHOOL INTERVIEWS OF SUSPECTED CHILD ABUSE VICTIMS THAT ARE CONDUCTED BY A SOCIAL WORKER OR A PEACE OFFICER DO NOT IMPLICATE THE FOURTH AMENDMENT AT THEIR INCEPTION.

A. This Issue Is Antecedent To And Fairly Included In The Issues Raised By Petitioners, And Thus The Court Can Address This Issue.

The *amici* recognize that it is a rule of Supreme Court practice that only those issues raised by the parties or fairly included in such issues will be considered by the Court. Sup. Ct. R. 14(1)(a). But that rule is not always strictly followed. *Kolstad v. American Dental Association*, 527 U.S. 526, 540 (1999), citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 37 (1991) (Stevens, J., dissenting). Indeed, in *Vance v. Terrazas*, this Court noted, "[i]n any event, consideration of issues not present in the jurisdictional statement or petition for certiorari and not presented in the Court of Appeals is not beyond our power, and in appropriate circumstances we have

addressed them." *Vance v. Terrazas*, 444 U.S. 252, 258-59 n.5 (1980).

Significantly, in *Arcadia v. Ohio Power*, this Court found there was an issue "antecedent" to those raised by the parties that needed to be addressed. *Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990). In that case, the antecedent issue was identified by the Court. But on other occasions, the issue the Court reached was identified only by *amicus curiae*. *See, e.g., Teague v. Lane*, 489 U.S. 288, 300 (1989); *Capital Cities Cable v. Crisp*, 467 U.S. 691, 697-98 (1984). *See also, Eugene Gressman et al., Supreme Court Practice* §§ 6.26(d) at 466, 13.4 at 741 (9th ed. 2007). Such is the case here.

The fundamental first question of any analysis regarding an alleged violation of the Fourth Amendment is whether the Fourth Amendment is implicated in the first place. The Ninth Circuit in this case held it was, but *amici* assert it was not. Instead, the *amici* assert that absent egregious circumstances, a public school interview by a peace officer or social worker of a suspected child abuse victim does not implicate the Fourth Amendment.

This issue is not new to the parties. The Ninth Circuit chose to follow the two-step inquiry of *Saucier v. Katz*, 533 U.S. 194 (2001). *Greene v. Camreta*, 588 F.3d 1011, 1021 (9th Cir. 2009). As such, it expressly addressed the question of whether the public school interview of the suspected child abuse victim implicated the Fourth Amendment. It found the interview was a seizure. *Id.* at 1022, 1027-28, 1030 n.18.

Moreover, the Petitioners recognized, although did not directly address in their Petitions for Certiorari, that not all public school interviews implicate the Fourth Amendment. Camreta Pet., at 12 ("Depending on the particular circumstances of an interview, interviewing a child may effect a Fourth Amendment seizure."), 13 ("Admittedly, not every interview of a potential child-abuse victim will amount to a constitutional seizure."), 15 ("[The Ninth Circuit's] decision is triggered only if, at some point during the interview of the potential child-abuse victim, state officials 'seize' that child."); Alford Pet., at 3 n.1 ("as case law from several of the circuits have made clear, not all interviews of suspected child abuse victims in public schools by law enforcement or child protective workers amount to seizures under the Fourth Amendment").

The *amici* assert this is an antecedent issue and fairly included in the issues raised by the Petitioners. Thus, this Court has jurisdiction to consider the question of whether, absent egregious circumstances, a public school interview conducted by a peace officer or social worker of a suspected child abuse victim implicates the Fourth Amendment. More specifically, it has jurisdiction to determine that absent egregious circumstances, public school interviews of suspected child abuse victims do not implicate the Fourth Amendment at their inception.

B. The Court Should Address This Issue To Provide Clear Guidance For Future Cases.

Although this Court has jurisdiction to address the issue of whether a public school interview conducted or observed by a peace officer automatically implicates the Fourth Amendment, should it? The *amici* submit it should.

The Ninth Circuit utilized the approach set out by this Court in *Saucier*, and observed "the constitutional standards governing the in-school seizure of a student who may have been abused by her parents are of great importance." *Greene*, 588 F.3d at 1021. As such, it expressly addressed the question of whether the public school interview of the suspected child abuse victim implicated the Fourth Amendment, noting it was doing so "to provide guidance to those charged with the difficult task of protecting child welfare within the confines of the *Fourth Amendment*." *Id.* at 1022, italics in original.

As written by Justice Scalia in a dissent joined by the then Chief Justice from the denial of a petition for certiorari, a constitutional determination made under the first prong of *Saucier* "is not mere dictum in the ordinary sense, since the whole reason we require it to be set forth (despite the availability of qualified immunity) is to clarify the law and thus make unavailable repeated claims of qualified immunity in future cases." *Bunting v. Mellen*, 541 U.S. 1019,

1023-24 (2004) (Scalia, J., dissenting). That is the situation here.

The Ninth Circuit held that having a peace officer, particularly an armed peace officer, accompany the social worker for the public school interview of the suspected child abuse victim "constituted sufficient entanglement with law enforcement to trigger the traditional Fourth Amendment prerequisites to seizure of a person." *Greene*, 588 F.3d at 1028. That determination has had a huge impact on the way child abuse investigations are done in the Ninth Circuit. In some instances, it has meant a child was not interviewed; in many others, it has delayed the interview and possible protection of children. The question of whether the presence of a peace officer at a public school interview of a suspected child abuse victim automatically implicates the Fourth Amendment is an issue of national importance that can and should be addressed by this Court.

C. Absent Egregious Circumstances, Public School Interviews Of Suspected Child Abuse Victims That Are Conducted By Social Workers Or Peace Officers Do Not Implicate The Fourth Amendment.

1. The Presence of a Peace Officer Does Not Automatically Mean a Public School Interview is a Seizure.

While this Court has not yet addressed the issue of public school interviews of suspected child abuse

victims, it has addressed the issue of peace officers being armed during contacts with the public and with such contacts taking place in limited space situations. And it has dealt with restrictions on a child's freedom of movement at public school. As this Court stated almost two decades ago, "Since *Terry*, we have held repeatedly that mere police questioning does not constitute a seizure."[2] *Florida v. Bostick*, 501 U.S. 429, 434 (1991). The *amici* submit the same is true when the interview is done by a social worker and a peace officer, regardless of which one questions and which one observes.

a. Peace Officers Have a Legitimate Role in the Protection of Children.

The Ninth Circuit speculated the peace officer in this case may have been present at the public school interview of the suspected child abuse victim, "reasoning that a nine-year-old girl would surely feel compelled to talk truthfully in the presence of a uniformed, armed police officer." It also speculated the peace officer may have been there solely for the purpose of gathering evidence of criminal activity. *Greene*, 588 F.3d at 1027-28. Those were the only two possibilities the Ninth Circuit could imagine. It was incorrect.

---

[2] *Terry v. Ohio*, 392 U.S. 1 (1967).

At the time of our founding and for many decades thereafter, child protection was carried out largely by private charitable organizations, orphanages, apprenticeships, and even the practice of indenturing the child as a servant. John E.B. Myers, *Child Protection in America: Past, Present, and Future*, ch. 1, at 11-26, ch. 2, at 47-48 (2006). Eventually, the responsibilities of child protection were gradually taken over by the government. *Id.* at ch. 3, at 71-76. But as late as the mid-twentieth century, hundreds of counties throughout this nation had no countywide system for child protection. Instead, many used police and the juvenile court's probation staff. *Id.* at 76. "Today, child protection is the domain of social work, with supporting roles for police, mental health, medicine, nursing, and law." Myers, *Child Protection in America*, ch. 3, at 50. But that does not mean peace officers are not directly involved in child protection. They are.

The *amici* recognize and agree with the information and arguments presented in the Petitioners' Briefs on the Merits and the *amicus* briefs in support of the Petitioners, regarding the benefits and regular practice of having social workers and peace officers work together in the investigative stage of child protection. This includes multi-disciplinary teams. These approaches are the norm and best practice in California also. *See, e.g.*, Cal. Penal Code §§ 11166.3, subdiv. (a) (communication between law enforcement agencies and county welfare departments investigating child abuse or neglect cases), and 13517 (development of procedures for minimizing the number of

times a child is interviewed by law enforcement personnel) (West 2010).

The *amici* also note California statutory law further demonstrates the state's expectation that its peace officers are to be involved in child protection investigations. Under current California law, whenever any government agency, including law enforcement, is investigating suspected child abuse or neglect and determines it is necessary to interview the suspected victim, the child may be interviewed on school premises during school hours regarding the report of abuse or neglect occurring in the child's home or an out-of-home care facility. Cal. Penal Code § 11174.3, subdiv. (a) (West 2010).[3] California peace officers do not have the discretion not to investigate child abuse. They are mandated to do so. *Alejo v. City of Alhambra*, 75 Cal. App. 4th 1180, 1186-90 (Cal. Ct. App. 1999). *See also* Cal. Stat. ch. 916, § 34 (2000) (Cal. Assemb. B. 1241) (stating subsequent statutory amendments were not intended to abrogate the holding in *Alejo*), http://www.leginfo.ca.gov/pub/99-00/bill/asm/ab_1201-1250/ab_1241_bill_20000929_chaptered.html (last visited Dec. 14, 2010). Likewise, California peace officers are mandatory reporters of suspected

[3] The child is provided the option of being interviewed in private or to select any adult member of the school staff, including both employees and volunteers, to be present during the interview. Cal. Penal Code § 11174.3, subdiv. (a) (West 2010).

child abuse and neglect. Cal. Penal Code § 11165.7 subdivs. (a)(19) & (34) (West 2010).[4]

As such, peace officers have a legitimate child protection role to fulfill. Peace officers are present to support and protect the social worker during the investigation process, to be a second set of eyes and ears to corroborate or refute the social workers' documentation and memory of the events, especially when the interview of the suspected child abuse victim is not able to be recorded, to avoid the need for multiple interviews of the suspected victim, and to fulfill the peace officers' own duties and responsibilities in the investigation of child abuse and neglect. There is nothing improper in having a peace officer present at a public school interview of a suspected

[4] Further, California peace officers may, without a warrant or court order, take a child into temporary custody under certain circumstances. Cal. Welf. & Inst. Code § 305, subdivs. (a), (b) & (d) (West 2010). At the initial or detention hearing police reports are often attached to social workers' reports, which constitute admissible evidence to support temporary protective custody of children, subject to certain provisions. Cal. R. Ct. 5.674(b). Indeed, a juvenile court making detention findings may rely solely on written reports by peace officers. Cal. R. Ct. 5.676(b). And at the jurisdiction hearing at which the juvenile court ultimately determines whether the factual allegations bring the child within the court's dependency jurisdiction, statements of police officers included in social workers' reports are an exception to the hearsay rule, subject to possible cross-examination or other challenge. Cal. Welf. & Inst. Code § 355 subdiv. (c)(1)(C) (West 2010). All demonstrate the involvement of California peace officers in child protection.

child abuse victim as either the questioner or an observer.

b. Not All Contacts With Peace Officers Are Fourth Amendment Seizures.

Despite the Ninth Circuit's conclusion that any time a peace officer participates in a public school interview of a suspected child abuse victim the Fourth Amendment is automatically implicated, that is not the case. *Greene*, 588 F.3d at 1028. In *Bostick*, this Court addressed the question of whether being on a bus when contacted by law enforcement meant a reasonable person would not have felt free to leave. It noted:

> Here, for example, ***the mere fact that Bostick did not feel free to leave the bus does not mean that the police seized him***. . . . Bostick's movements were "confined" in a sense, but this was the natural result of his decision to take the bus; ***it says nothing about whether or not the police conduct at issue was coercive***.

Bostick, 501 U.S. at 436 (emphasis added). It went on to say, "Bostick's freedom of movement was restricted by a factor independent of police conduct – *i.e.*, by his being a passenger on a bus." *Id.*; *see also*, *Immigration & Naturalization Service v. Delgado*, 466 U.S. 210, 218 (1984) ("Ordinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement

officials, but by the workers' voluntary obligations to their employers."). Thus, even in confined settings, contact with a peace officer does not automatically implicate the Fourth Amendment.

Likewise, in *Greene*, the Ninth Circuit went to great length to point out the social worker who conducted the public school interview was accompanied by an armed peace officer. *Greene*, 588 F.3d at 1017 ("visible firearm"), 1027 ("visible firearm"), 1028 ("armed police officer"), 1031 ("police officer carrying a firearm"), 1032 ("armed police officer"). And it held that having the peace officer accompany the social worker for the interview "constituted sufficient entanglement with law enforcement to *trigger the traditional Fourth Amendment prerequisites to seizure of a person*." *Id.* at 1028 (emphasis added). But the fact a peace officer is armed during a public school interview of a suspected child abuse victim does not automatically implicate the Fourth Amendment.

In *Bostick*, this Court reviewed a case in which "[t]wo officers, complete with badges, insignia and one of them holding a recognizable zipper pouch, containing a pistol boarded a bus," made contact with individuals on the bus, and eventually conducted a search of one individual's luggage. *Bostick*, 501 U.S. at 431-32 (quoting the Florida Supreme Court's underlying decision; internal quotation marks omitted). This Court did not decide whether a Fourth Amendment seizure had occurred, deciding to send it back to

the Florida Supreme Court to determine that question, now under the correct standard. *Id.* at 437-38.

This Court made clear, however, that the fact an armed police officer contacted a person on a bus did not decide the issue. This court found it "particularly worth noting" that "at no time did the officers threaten Bostick with a gun." *Bostick*, 501 U.S. at 432; *see also, id.*, at 437. Further, there was no suggestion the pistol the officer was carrying "was ever removed from its pouch, pointed at Bostick, or otherwise used in a threatening manner." *Id.* at 432; *see also, Delgado*, 466 U.S. at 212 (noting that "at no point during any of the surveys was a weapon ever drawn.").

Similarly, in *United States v. Drayton*, 536 U.S. 194 (2002), this Court dealt with whether a peace officer being armed transformed a contact with a member of the public into a seizure. "That most law enforcement officers are armed is a fact well-known to the public. The presence of a holstered firearm thus is unlikely to contribute to the coerciveness of the encounter absent active brandishing of the weapon." *Id.* at 205.

This is no different with most children. Indeed, despite Deputy Alford being armed, the suspected victim in this case stated she was "generally comfortable around police officers, that Alford was nice to her and did not do anything to scare her, and that she trusted him." *Greene*, 588 F.3d at 1017. The mere presence of an armed peace officer at a public school

interview of a suspected child abuse victim does not implicate the Fourth Amendment.

2. To Implicate the Fourth Amendment, a Public School Interview of a Suspected Child Abuse Victim Must Limit the Child's Freedom of Movement Significantly Greater Than in Everyday Compulsory Attendance.

As addressed at length in the Petitioners' Briefs on the Merits, children in public school have a reduced expectation of and right to liberty and privacy. Camreta BOM at 30-34; Alford BOM at 50-53. The *amici* will not repeat that at length. It notes only that this and other courts have recognized that when children are at school their liberty is naturally restricted. "Traditionally at common law, *and still today*, unemancipated minors lack some of the most fundamental rights of self-determination – including even the right of liberty in its narrow sense, *i.e., the right to come and go at will.*" *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 654 (1995) (emphasis added). *See, Wallace by Wallace v. Batavia Sch. Dist. 101*, 68 F.3d 1010, 1013 (7th Cir. 1995) ("[L]aw compels students to attend school, which deprives them of a level of freedom of mobility. Once under the control of the school, students' movement and location are subject to the ordering and direction of teachers and administrators."). Likewise, a student has a reduced expectation of privacy while at school. *New Jersey v. T.L.O.*, 469 U.S. 325, 342-43 (1985).

As the Tenth Circuit has well stated, ***"To qualify as a seizure in the school context, the limitation on the student's freedom of movement must significantly exceed that inherent in every-day, compulsory attendance."*** *Couture v. Bd. of Educ. of the Albuquerque Pub. Schs.*, 535 F.3d 1243, 1251 (10th Cir. 2008) (emphasis added). The *amici* agree.

Here, as with most such interviews, the public school interview did not implicate the Fourth Amendment at its inception. Nor did it significantly exceed the limitations on the child's liberty and privacy interests that are inherent in a child's everyday compulsory school attendance. School children are often directed or taken to other rooms or locations within their school. They are often asked questions or talked to by adults at the school including teachers, aides, school nurses, school police resource officers, or principals. At the outset, nothing here, or in most such public school interviews, significantly exceeded the normal limitations on a child's liberty or privacy interests inherent in compulsory school attendance, and hence the Fourth Amendment was not implicated at its inception.

3. A Public School Interview of a Suspected Child Abuse Victim is Not an Interrogation.

Although the Ninth Circuit was not asked to address whether the public school interview of the child was a search, it looked to many cases involving

searches, an analogy that is not always apt. *Greene*, 588 F.3d at 1023 n.7. In doing so, the Ninth Circuit's attitude toward the government officials in this case was also demonstrated by the court's repeated description of the interview of the suspected child abuse victim as an "interrogation." *Id.* at 1020, 1022-23, 1027 n.12, 1030. This characterization was incorrect.

An interrogation is questioning or its functional equivalent that is "reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). A public school interview of a suspected child abuse victim is not designed to elicit an incriminating response from the child. The child is a suspected victim. The interview is only designed to determine whether the child has been abused or neglected or is at substantial risk of such abuse or neglect, to help assess whether any other children in the home have been similarly abused or neglected, and whether any protective measures are needed. Thus, an interview of a suspected child abuse victim is not an interrogation.

D. Absent Egregious Circumstances, A Public School Interview Of A Suspected Child Abuse Victim Does Not Implicate The Fourth Amendment At Its Inception.

From these cases and discussions, a common thread emerges. Children's liberty at school is naturally and permissibly restricted by the very fact they

are attending school. A peace officer being armed does not render a contact a seizure absent pulling the weapon from the holster or otherwise brandishing the firearm. And a peace officer or social worker contacting a person in a place where that person's mobility is already limited, such as a bus, workplace, or school, does not by itself render that contact coercive or a seizure.

Applying that thread to the facts of this and most cases of public school interviews of suspected child abuse victims that are conducted by social workers and peace officers results in one conclusion. Absent egregious circumstances, such interviews do not implicate the Fourth Amendment at their inception. The *amici* ask this Court to so find.

II. IF THE FOURTH AMENDMENT IS IMPLICATED IN A PUBLIC SCHOOL INTERVIEW OF A SUSPECTED CHILD ABUSE VICTIM THAT IS CONDUCTED BY A PEACE OFFICER OR SOCIAL WORKER, THE TRADITIONAL BALANCING TEST SHOULD APPLY.

This Court has recognized that, "Child abuse is one of the most difficult crimes to detect and prosecute, in large part because *there often are no witnesses except the victim*. A child's feelings of vulnerability and guilt and his or her unwillingness to come forward are particularly acute when the abuser is a parent." *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (emphasis added). That realization was echoed

by one leading authority who wrote, "in many cases the need for the child's out-of-court statements is magnified by *a paucity of physical evidence and eyewitnesses*." John E.B. Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases*, § 7.01, at 478 (2005) (successor edition to John E.B. Myers, *Evidence in Child Abuse and Neglect Cases* (3d ed. 1997)) (emphasis added). Thus, an interview of the child is often the only means to obtain evidence of child maltreatment, especially sexual abuse. This is true not only in criminal cases, but in juvenile or family court cases brought for the child's protection. As such, whether a public school interview of a suspected child abuse victim implicates the Fourth Amendment at its inception is of great importance.

If the Fourth Amendment is implicated at the inception of such an interview, the *amici* agree with the Petitioners that the proper Fourth Amendment test is the reasonableness balancing test. They write separately here to emphasize that children's right and compelling interest in being safe from abuse and neglect is a factor that must be considered in all Fourth Amendment analyses of child protection investigations.

A. Children Have A Right And A Compelling Interest To Be Safe From Abuse And Neglect.

The rights of children are a matter of constant debate and evolvement not only in this country, but

throughout the world. There is no consensus. What is clear, however, is that children do have rights. The *amici* submit that in addition to the privacy and familial association interests, which many courts in this country have recognized children possess, at least to some degree, children also have a right and compelling interest to be safe from abuse and neglect.

Is this a constitutional right to protect them from abuse and neglect by their parents? No. Instead, it is a liberty interest separate from the Constitution, but implicitly recognized by our founding documents. And it is a compelling interest that children have that is as fundamental, self-evident, and unalienable to a child's liberty interests as the child's right to familial association and privacy, perhaps more. *See* The Declaration of Independence para. 2 (U.S. 1776).

In *Gates*, the Fifth Circuit recognized that child protection investigations in which a Fourth Amendment seizure takes place involve interests not present in most seizures in criminal cases. It noted that when a person is seized in a criminal case, it is to keep that individual from harming others. But when a child is seized in a child protection case, it is to keep others from harming the child. "Thus, while a Fourth Amendment seizure has taken place when the government seizes the alleged victim of child abuse, ***the government's interest is primarily in protecting the child, not in restricting the child's freedoms***." *Gates v. Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 427-28 (5th Cir. 2008) (emphasis added).

Having spoken of the government's interest, the Fifth Circuit went on to speak of the child's interest in safety. "Therefore, when courts are called upon to balance the child's Fourth Amendment rights with the government's interests, ***it is important to recognize that the child's interests may align with the government's interests if, indeed, the child is at risk of abuse***." *Id.* at 428 (emphasis added). *See, Spiering v. Heineman*, 448 F.Supp.2d 1129, 1140 (D.Neb. 2006) (there are "two competing values of equal worth: the right of parents to parent and the right of children to safety.").

The *amici* could not have said it better. What is the source of children's right and compelling interest in being safe from abuse and neglect? The self-evident and inherent right of all men, women, and children to life and liberty. Whether conservative or liberal, Democrat or Republican, Christian, Jew, Muslim, or Buddhist, or a member of any other form of human or spiritual categorization; the *amici* assert that all reasonable people recognize children have a right to and compelling interest in being safe from abuse and neglect. The *amici* ask this Court to acknowledge that basis and to provide legal recognition of children's right and compelling interest to be safe from abuse and neglect.

B. Children's Right And Compelling Interest To Be Safe From Abuse And Neglect Is A Factor That Should Be Considered In All Fourth Amendment Analyses Of Child Protection Investigations.

This Court has often stepped forward to address questions relating to the rights of juveniles suspected of committing crimes or those who have been found to have committed such crimes. *See, e.g.*, *In re Gault*, 387 U.S. 1 (1967) (certain rights afforded adults charged with crimes apply to juveniles also); *Roper v. Simmons*, 543 U.S. 551 (2004) (death penalty cannot apply to those who were minors when the crime was committed); *Graham v. Florida*, 130 S. Ct. 2011 (2010) (life without possibility of parole cannot be imposed for nonhomicide offenses committed by minors). But this Court has not yet clearly provided similar guidance on the rights of child abuse victims and how those rights should impact the analysis of Fourth Amendment claims. Nor have the appellate courts, which have often commented on the state's compelling interest in protecting children, but rarely speak of the child's own right to safety, choosing instead to balance the state's compelling interest in child protection against the child's right to privacy or familial association. As already indicated, the Fifth Circuit is an exception.

The Fifth Circuit used the child's interest in safety, and the fact an abused child is normally living in the home with the abuser, to impact its definition of exigent circumstances. *Gates*, 537 F.3d at 429. The

amici assert it should also impact the decision as to whether a traditional balancing test should apply, rather than requiring a warrant, court order, parental consent, or exigent circumstances. It should apply to determine whether a particular action by law enforcement or social services was reasonable under the circumstances. Indeed, it should apply in any Fourth Amendment analyses.

The child is not a suspect in child protection investigations. The child is a potential witness, and more importantly, a suspected victim. Any court looking at any alleged Fourth Amendment violation in any phase of a child protection investigation should take into account the child's right and compelling interest in being safe from abuse and neglect.

Specifically, if the Fourth Amendment is implicated at the inception of a public school interview of a suspected child abuse victim, the traditional balancing test should apply. And in applying that standard, the *amici* submit the child's right to safety from abuse and neglect is a compelling interest that must be considered in any Fourth Amendment analysis of a child protection investigation.

To be clear, the *amici* do not contend that a child's right to and compelling interest in being safe from abuse and neglect should override all other considerations. *Gates*, 537 F.3d at 429. The child's right to privacy and freedom of movement, though restricted, and to familial association are also important factors to be considered when balancing

against the state's compelling interest in protecting children and the child's right to be safe in his or her home. Nor do the *amici* suggest a constitutional right to such safety exists thereby imposing a duty on government agencies; this Court has already dealt with that issue and found there is no such obligation. *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989).

But as a matter of fundamental rights and national policy, the right and compelling interest of children to be safe is a matter of great importance and should be considered by this and all other courts in any Fourth Amendment analysis of a child protection investigation.

C. Viewing An Actual Case Through A Requirement For A Warrant, Court Order, Parental Consent, Or Exigent Circumstances Shows The Dangers The Ninth Circuit's Approach Causes.

A recent California case demonstrates the danger that a requirement for a warrant, court order, parental consent, or exigent circumstances poses in child protection investigations. *People v. Assad*, 189 Cal. App. 4th 187 (Cal. Ct. App. 2010). In the *Assad* case, a twelve-year-old boy missed school one Monday. The following day he was present and two of his teachers noted he had a black eye and cuts on his face, was moving slowly, limping, kept falling asleep in class, and kept trying to keep the weight of his

backpack off his shoulder. Out of concern for his health, he was taken to the principal's office. *Id.* at 191.

The principal noted the boy "'looked very gray.'" His left eye was black with scratches below it; he had a scratch on his chin and another scratch on the right side of his upper lip. While it was a warm day, he was wearing a long-sleeve shirt with an undershirt. When the principal asked him several times how the injuries occurred, the boy repeatedly answered he had fallen off his bicycle. The principal did not believe him. The police and Child Protective Services were called. *Assad*, 189 Cal. App. 4th at 191.

What is significant for this Court's consideration is that at this point in *Assad* neither child protection nor the police had exigent circumstances to allow them to interview the boy. Nor did they have probable cause or even reasonable cause to get a warrant or court order for such an interview. The boy may well have fallen off his bike, and while obviously somewhat banged up and sore, there appeared no immediate need for medical attention or protective custody. Indeed, what they really had was some injuries and a principal's gut feeling the boy was not telling the truth. While that was enough to cause the social worker and peace officer to respond to the principal's call and talk with the boy, and while it was reasonable for them to do so, it would not have met the Ninth Circuit's standards. Applying the Ninth Circuit's requirement for a warrant, court order, exigent circumstances, or parental consent before they could interview the

boy, there was no basis for the police or social worker to interview the boy absent parental consent. Would they have been able to get the parent's consent? Read on.

When the police and child protection worker arrived, the boy was again brought to the principal's office. As with the principal, he told the officer and social worker that he had been injured in a bicycle accident. When asked to roll up his sleeves and lift his shirt, however, he refused to do so. *Assad*, 189 Cal. App. 4th at 191-92.

The boy's father arrived at the school a short time later to pick up his children. Like the boy, he told police his son had been hurt in a bicycle accident. The police did not believe the father and when that became apparent to him, the father admitted he sometimes lost his temper and that he had whipped his son's back one time. *Assad*, 189 Cal. App. 4th at 192. As reported by the appellate court that reviewed the father's conviction for mayhem and torture, he did far more than whip his son's back one time.

What had actually happened was the father, on three separate occasions over the two-day weekend, bound the boy's hands and feet to the bed, and beat the child on his back, chest, stomach, sides, and legs with a length of garden hose that had a metal fitting at the end of it. He had also bitten most of the boy's fingertips leaving bruises on both sides. From his waist to mid-nipple height almost 360 degrees around, the boy was severely bruised with abrasions

and open lesions at various stages of healing, some fairly fresh and some several days or weeks old. Five months later a doctor found the boy's extensive scarring on his torso and upper extremities was still very visible, with the doctor opining the scars would be a permanent disfigurement. The father had been physically abusing the boy for several years, some requiring hospital visits. He had once heated a knife blade on the stove and placed it on top of the boy's foot causing a burn. *Assad*, 189 Cal. App. 4th at 192-93.

The boy was not the only one abused. He had two sisters, one older and one younger. Their father had slapped both of them in the face, pulled the younger girl by the ear, and hit the older girl's hands with a wooden rolling pin. *Assad*, 189 Cal. App. 4th at 192. The older sister had attempted to intercede in the father's abuse of her brother, "because 'common sense' required her to do so." *Id.* at 193.

Why did the boy lie to both the principal and to the peace officer and social worker? Why did he refuse to lift up his shirt and roll up his sleeves? As was later determined, he lied and refused to lift up his shirt to protect his father. *Assad*, 189 Cal. App. 4th at 191-92.

The *Assad* case illustrates several points that are important to the issues presented in this case. First, the boy's right and compelling interest in being safe from abuse and neglect was being horribly violated in his own home over a long period of time, yet it had apparently not been discovered. Even physical abuse as tortuous and ongoing as this can escape notice by

teachers, other public school staff, and even medical professionals.

It also demonstrates that if the Ninth Circuit's requirement for a warrant, court order, parental consent, or exigent circumstances had applied, the child would likely never have been interviewed at the school, and likely would not have been followed up on. The boy's explanation was both possible and arguably reasonable. There was no sufficient evidence on which to obtain a warrant or court order, no sufficient evidence to establish exigent circumstances, and little or no likelihood the father would have consented to an interview of his son. Yet the child was being tortured and seriously abused, not just that previous weekend, but for years. The Ninth Circuit's approach would have placed that boy and his siblings at risk of further abuse in the home.

The *Assad* case also shows that just as nine year-old S.G. may have recanted in this case when not taken into custody and faced with a lack of support at home, so too do children delay reporting the abuse they have suffered or deny such abuse to protect their parents. *United States v. Provost*, 969 F.2d 617, 621 (8th Cir. 1992); *United States v. George*, 960 F.2d 97, 101 (9th Cir. 1992).

Finally, the *Assad* case also demonstrates the issues raised in this case are faced not only in sexual abuse investigations, but in physical abuse and other types of child abuse and neglect investigations as well.

CONCLUSION

Our Nation has long needed this Court to resolve the well-established conflict and confusion created by the Courts of Appeals regarding the application of the Fourth Amendment to child protection investigations, including public school interviews of suspected child abuse victims. The *amici* agree with the Petitioners that the Ninth Circuit was wrong in requiring a warrant, court order, parental consent, or exigent circumstances for public school interviews in cases such as this. And, if the Fourth Amendment is implicated, they agree with the Petitioners that the Fourth Amendment balancing test for reasonableness is the proper test for this Court to require. But the *amici* ask this Court to do more.

The *amici* ask this Court to order briefing on the antecedent and fairly included issue raised in this brief: Whether, in the absence of egregious circumstances, a public school interview of a suspected child abuse victim that is conducted by a social worker and a peace officer necessarily implicates the Fourth Amendment at its inception. And the *amici* ask this Court to find that it does not.

The *amici* also request this Court to address the fairly included issues of children's right to and compelling interest in being safe from abuse and neglect, and how it impacts Fourth Amendment analysis in child protection investigations. They ask this Court to find that children have such a right, and that the child's right to be safe from abuse and neglect is a

factor that must be considered in all Fourth Amendment analyses of child protection investigations.

Protecting children from abuse and neglect is an enormous task, yet it is a task that is of great importance to this country, its families, and its most vulnerable members – children. This Court now has the opportunity to establish clear and reasonable guidance, within the Constitution, for social workers and peace officers to begin that task. The *amici* ask that it do so.

Respectfully submitted December 17, 2010,

JOHN J. SANSONE, County Counsel
JOHN E. PHILIPS, Chief Deputy
GARY C. SEISER, Senior Deputy
Counsel of Record
OFFICE OF COUNTY COUNSEL
4955 Mercury Street
San Diego, CA 92111
Phone: 858.492.2500
Gary.Seiser@sdcounty.ca.gov
Counsel for Amici Curiae

JOHN E.B. MYERS
Of Counsel
UNIVERSITY OF THE PACIFIC
MCGEORGE SCHOOL OF LAW
3200 Fifth Avenue
Sacramento, CA 95817
Phone: 916.739.7176
jmyers@pacific.edu

Additional Counsel:

JENNIFER B. HENNING
Litigation Counsel
CALIFORNIA STATE ASSOCIATION OF COUNTIES
1100 K Street, Suite 101
Sacramento, CA 95814
Phone: 916.327.7500
jhenning@coconet.org

PATRICK WHITNELL
General Counsel
LEAGUE OF CALIFORNIA CITIES
1400 K Street
Sacramento, CA 95814
Phone: 916.658.8281
pwhitnell@cacities.org

Nos. 09-1454, 09-1478

In The

SUPREME COURT OF THE UNITED STATES

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

JAMES ALFORD, Deschutes County Deputy Sheriff,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CENTER FOR INDIVIDUAL RIGHTS AS AMICUS CURIAE SUPPORTING RESPONDENT

Michael E. Rosman
Counsel of Record
Center for Individual Rights
1233 20th St. NW, Suite 300
Washington, DC 20036
(202) 833-8400
rosman@cir-usa.org

QUESTIONS PRESENTED

Petitioners, government officials who had interrogated respondent's nine-year old daughter about possible abuse from respondent's husband, successfully moved for summary judgment in the district court. On review, the Ninth Circuit rejected one of the government officials' claimed bases for summary judgment: their contention that, even with all disputed facts and factual inferences resolved in favor of respondent, they had not violated the Fourth and Fourteenth Amendments to the U.S. Constitution. It nonetheless ruled that the government officials had qualified immunity, were not liable for any damages, and thus affirmed the district court's dismissal of respondent's Fourth Amendment claim. Despite this favorable result, the government officials filed a petition for a writ of certiorari and have asked this Court to review the Ninth Circuit's summary judgment analysis. Respondent did not appeal.

1. Does this Court have jurisdiction to determine petitioners' appeal, and, if so, should it exercise that jurisdiction?

2. Does a two-hour custodial interrogation of a nine-year old girl without a warrant, probable cause, or the consent of either parent violate the Fourth Amendment of the U.S. Constitution as incorporated through the Fourteenth?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF CITED AUTHORITIES v

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 4

I. THIS COURT LACKS JURISDICTION TO REVIEW THE FOURTH AMENDMENT CONCLUSIONS OF THE NINTH CIRCUIT'S OPINION; EVEN IF IT HAD SUCH JURISDICTION, IT SHOULD DECLINE TO EXERCISE IT 5

A. This Court Reviews Judgments 6

B. The "Equivalence" Argument And *Hewitt* 11

C. There Is No Case Or Controversy 14

D. Prudential Reasons Militate In Favor Of Declining To Address Fourth Amendment Issues . 20

II. THE COURT BELOW DID NOT ERR IN REFUSING TO GRANT PETITIONERS' MOTION FOR SUMMARY JUDGMENT SOLELY ON FOURTH AMENDMENT GROUNDS 23

A. Seizures For More Than A Few Minutes In Length Generally Require Probable Cause . . . 23

B. Petitioners' Criteria Lack Both Coherence And A Fourth Amendment Pedigree 30

1. History. 30

2. Child Abuse Investigations 31

3. Witnesses And Victims 32

4. School Context 34

C. Other Factors Militate In Favor Of Strict Adherence To Fourth Amendment Standards 37

1. Children Cannot Consent As Adults Do 37

2. Family Rights 39

CONCLUSION 41

TABLE OF CITED AUTHORITIES

Cases

Almeida-Sanchez v. United States, 413 U.S. 266 (1973) 25, 32

Arizonans For Official English v. Arizona, 520 U.S. 43 (1997) 15, 16

Atwater v. City of Lago Vista, 532 U.S. 318 (2001) 24, 29, 30

Baker v. Carr, 369 U.S. 186 (1962) 18

Bender v. Williamsport Area School Dist., 475 U.S. 534 (1985) 15, 18

California v. Acevedo, 500 U.S. 565 (1991) 27

California v. Rooney, 483 U.S. 307 (1987) 7, 8

Camara v. Municipal Court, 387 U.S. 523 (1967) 26

Camreta v. Greene, 588 F.3d 1011 (9th Cir. 2009) 6, 20, 22, 23

Carroll v. United States, 267 U.S. 132 (1925) . . 30

Chathas v. Local 134 IBEW, 233 F.3d 508 (7th Cir. 2000) 6

Citizens for Better Forestry v. U.S. Dep't of Agriculture, 567 F.3d 1128 (9th Cir. 2009) 14

Commonwealth v. Colon, 726 N.E.2d 909 (Mass. 2000) 37

Davis v. Mississippi, 392 U.S. 721 (1969) . . 26, 33

Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326 (1980) 15, 16

Diamond v. Charles, 476 U.S. 54 (1986) 15, 17, 18

Dickerson v. United States, 538 U.S. 1045 (1999) 19

Dunaway v. New York, 442 U.S. 200, 210 (1979) 24, 33

Electrical Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241 (1939) 10

Fare v. Michael C., 442 U.S. 707 (1979) 38

Fed'l Communications Comm'n v. Pacifica Foundation, 438 U.S. 726 (1978) 5, 23

Ferguson v. City of Charleston, 532 U.S. 67 (2001) 3, 35, 36

Fisher v. University of Texas at Austin, 645 F. Supp. 2d 587 (W.D. Tex. 2009), *aff'd*, 2011 WL 135813 (5th Cir. Jan. 18, 2011) 10

Florida v. Royer, 460 U.S. 491 (1983) 25, 37

Gallegos v. Colorado, 370 U.S. 49 (1962) 38

Hayley v. Ohio, 332 U.S. 596 (1948) 38

Hewitt v. Helms, 482 U.S. 755 (1987) 11-14

Hopwood v. Texas, 78 F.3d 932 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996) 8, 10

Illinois v. Lidster, 540 U.S. 419 (2004) . 28, 33, 34

INS v. Delgado, 466 U.S. 210 (1984) 35

O'Connor v. Ortega, 480 U.S. 709 (1987) 36

Oliver v. United States, 466 U.S. 170 (1984) . . . 29

Pacific Bell Tel. Co. v. LinkLine Communications, Inc., 129 S. Ct. 1109 (2009) 19

Pierson v. Ray, 386 U.S. 547 (1967) 31

Safford Unified School District #1 v. Redding, 129 S. Ct. 2633 (2009) 39

Shaffer v. Carter, 252 U.S. 37 (1920) 16

State v. Hoyle, 194 P. 976 (Wa. 1921) 38

Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) 19

Summe v. Kenton County Clerk's Office, 604 F.3d 257, (6th Cir. 2010) 6

Terry v. Ohio, 392 U.S. 1 (1968) 24

Texas v. Hopwood, 518 U.S. 1033 (1996) 8, 9

Troxel v. Granville, 530 U.S. 57 (2000) 39, 40

United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 26

United States v. Martinez-Fuerte, 428 U.S. 543 (1976) 28

United States v. Mendenhall, 446 U.S. 544 (1980) 32

United States v. Montoya De Hernandez, 473 U.S. 531 (1985) 25

United States v. Place, 462 U.S. 696 (1983) . . 25, 28, 32

United States v. Watson, 423 U.S. 411 (1976) 27, 28, 31

Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995) 36

Wallis v. Spencer, 202 F.3d 1126 (9th Cir. 2000) 40

Wilson v. Arkansas, 514 U.S. 927 (1995) 31

Constitutional and Statutory Provisions

U.S. Const., amend. IV ..... i, *passim.*

U.S. Const., amend. XIV ..... i, 8, 39

U.S. Const., art. III 11, 14-16, 18, 19

25 U.S.C. § 3206 34

28 U.S.C. § 1291 11

28 U.S.C. § 1292 11

Other

Brief for the United States As Amicus Supporting Petitioners, *Texas v. Hopwood*, 518 U.S. 1033 (1996) (No. 95-1773) 9

Brief for United States as Amicus Curiae Supporting Petitioners, *Hewitt v. Helms*, 482 U.S. 755 (1987) (No. 85-1630) 12

Horace L. Wilgus, *Arrest Without A Warrant*, 22 U. Mich. L. Rev. 541 (1924) 31

INTEREST OF AMICUS CURIAE[1]

The Center for Individual Rights ("CIR") is a public interest law firm based in Washington, D.C. It has litigated constitutional issues in the federal courts and has a special interest in the rights of families.

Here, petitioners and their amici have asserted that this Court should create a new exception to the general probable cause requirement of the Fourth Amendment for investigations related to intrafamily child abuse. Because this argument would diminish substantially the protections provided by both the Fourth Amendment and the liberty interest in family and parental rights, CIR submits this amicus brief.

SUMMARY OF ARGUMENT

The court below affirmed a judgment dismissing the two individual petitioners. Since this Court reviews judgments, and not opinions, those two individuals cannot appeal that favorable judgment. The fact that the court below said

---

[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission.

things that petitioners did not like – *viz.*, that they violated the U.S. Constitution – does not change that fact. Had the court below skipped the part of the analysis in which it found that petitioners violated the Constitution, petitioners would not have prevailed in the case more than they have.

In another way, too, an appeal here is burdened by the absence of a party who truly has something at stake in the controversy. The Ninth Circuit did not issue any declaratory or injunctive relief and, even if it had, petitioners do not contend that they personally wish to engage in the conduct in question in the future. (Indeed, they do not even state that they are still employed in positions that would allow them to do so.) Having failed to appeal, respondent, in turn, cannot win any damages against petitioners, not even nominal damages, and her loss in the lower court precludes any claim for attorneys' fees against the petitioners. An affirmance of the Ninth Circuit's analysis of the constitutionality of petitioners' conduct would provide her with only a moral victory.

As to the Fourth Amendment analysis itself, should the Court choose to reach it, the Ninth Circuit was correct. This Court has repeatedly stated that the Fourth Amendment "reasonableness" requirement is generally tantamount to a requirement of "probable cause." It has identified only a few exceptions, and, with respect to *seizures of the person* outside of border

searches by customs officials, only one: a brief, fleeting, seizure of a person is subject to a balancing test weighing the state's and seized persons' respective interests. This Court has primarily applied this balancing test for fleeting personal seizures in one context, *viz.*, car stops. *Ferguson v. City of Charleston*, 532 U.S. 67, 83 n.21 (2001) (noting that "the handful of seizure cases in which we have applied a balancing test to determine Fourth Amendment reasonableness . . . involved roadblock seizures"). It has *never* applied it to anything *even remotely approaching* a two-hour interrogation of a nine-year old child in her school, regardless of the reason. To the contrary, this Court has rejected soundly any departure from the "probable cause" standard in anything analogous to the facts here.

Thus, petitioners and their amici, in a case in which no party has any substantial stake riding on the outcome, ask this Court to create a brand new, and quite broad, exception to the general "probable cause" requirement of the Fourth Amendment. They provide no justification for that new exception. Crime is frequently difficult to solve, and the Fourth Amendment is often an impediment to solving crime. Nothing about child or intrafamily abuse is particularly unique in that regard, and nothing about it suggests we should disregard the standard tradeoff between individual liberty and societal needs reflected in the probable cause requirement.

To the contrary. The fact that the seized person here was a nine-year old girl requires, as a matter of constitutional law, *more* vigilance about protecting individual liberty from *state* abuse. Children's "consent" to being seized would be questionable under any circumstances, much less the circumstances here, and they have a basic fundamental right to the advice and direction of their parents. By seizing this child without parental consent or judicial oversight, petitioners violated that basic right, and as a result, the life of a family was disrupted.

In short, petitioners ask for the wrong result in the wrong case.

ARGUMENT

Petitioners lack standing to raise the Fourth Amendment issue here and, even if they had standing, it would be a poor exercise of this Court's discretionary jurisdiction to address that issue. Further, the question of whether petitioners were entitled to summary judgment even given the respondent's evidence is controlled by this Court's precedents.

I. THIS COURT LACKS JURISDICTION TO REVIEW THE FOURTH AMENDMENT CONCLUSIONS OF THE NINTH CIRCUIT'S OPINION; EVEN IF IT HAD SUCH JURISDICTION, IT SHOULD DECLINE TO EXERCISE IT

It is a fundamental precept that this Court (and other federal appellate courts) reviews judgments, and not statements in opinions. *Fed'l Communications Comm'n v. Pacifica Foundation*, 438 U.S. 726, 734 (1978). The rule has "special force when the statements raise constitutional issues." *Id.* Whether application of that rule is jurisdictional in all instances, its application here is. And even if it were not, there are a number of prudential reasons for this Court to decline to review the Ninth Circuit's opinion. That court said only that petitioners were not entitled to summary judgment solely on the ground that undisputed facts demonstrated that they did not violate S.G.'s constitutional rights.

Not only is that issue not worth reviewing at this time, petitioners and their amici do not *want* this Court to review it. Rather, they want this Court to ignore the actual length and nature of the seizure and interrogation, and opine about hypothetical seizures and interrogations not involved in this case.

That being said, the petitioners had it within their power to fix many of these

jurisdictional and prudential problems. They could have waived their qualified immunity defense in the district court. *See Summe v. Kenton County Clerk's Office*, 604 F.3d 257, 269-70 (6th Cir. 2010) (holding that defendant who raised qualified immunity defense in his answer, but omitted any discussion of it in his summary judgment papers, waived qualified immunity). *Cf.* Camreta Br. 43 n.6 (noting indemnification provisions of Oregon law). Defendants chose the safety of qualified immunity over the greater justiciability that would have come with waiving that defense. They should be held to that decision.

A. This Court Reviews Judgments

The court below stated that "with respect to S.G.'s Fourth Amendment claims," it "affirm[ed] the district court's grant of summary judgment on th[e] basis" of qualified immunity. *Camreta v. Greene*, 588 F.3d 1011, 1037 (9th Cir. 2009). As a general matter, "[a] winning party cannot appeal merely because the court that gave him his victory did not say things that he would have liked to hear . . . Judgments are appealable; opinions are not." *Chathas v. Local 134 IBEW*, 233 F.3d 508, 512 (7th Cir. 2000). As tacit acknowledgment of this rule, petitioners' and the United States's conclusions seek to have the *judgment* reversed or vacated. *E.g.*, Alford Br. 64; Brief for the United States As Amicus Supporting Petitioners ("U.S. Br.") 34. *But cf.* U.S. Br. 17 (suggesting "vacatur of the adverse portion of the lower-court decision").

Petitioners do not explain why they need to have a *judgment* that favored them reversed or vacated.

The rule that this Court does not review statements in opinions has been applied by this Court in similar circumstances. In *California v. Rooney*, 483 U.S. 307 (1987), police had searched the communal trash bin of the apartment building in which Rooney lived and had discovered evidence of illegal gambling. The police subsequently obtained a search warrant of Rooney's apartment based upon the fruits of that trash search and other pieces of evidence. *Rooney*, 483 U.S. at 309. Rooney sought to suppress the fruits of the apartment search on the ground that the trash search was illegal and that there was insufficient other evidence to support probable cause. The California Court of Appeal stated that the trash search was, in fact, illegal, but that the other evidence supporting the warrant was sufficient. *Id.* at 310. The State sought review in this Court of the ruling that the trash search was illegal.

This Court, noting the rule that it reviews judgments, and not opinions, dismissed the writ as improvidently granted, holding:

> The fact that the Court of Appeal reached its decision through analysis different than this Court might have used does not make it appropriate for this Court to rewrite the California court's decision, or for the prevailing

> party to request us to review it. That the Court of Appeal even addressed the trash bin issue is mere fortuity; it could as easily have held that since there was sufficient evidence to support the [apartment] search even without the trash evidence, it would not discuss the constitutionality of the trash search. *The Court of Appeal's use of analysis that may have been adverse to the State's long-term interests does not allow the State to claim status as a losing party for purpose of this Court's review.*

Id. at 311 (emphasis added).

Similarly, in *Texas v. Hopwood*, 518 U.S. 1033 (1996), the district court had held that the system of admission to the University of Texas Law School in 1992 discriminated on the basis of race in violation of the Equal Protection Clause of the Fourteenth Amendment because it was not narrowly-tailored to meet a compelling government interest. *Hopwood v. Texas*, 78 F.3d 932, 939 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996). Plaintiffs appealed from that judgment, but defendants did not. The Fifth Circuit Court of Appeals went further and held that educational diversity was not a compelling governmental interest sufficient to justify the consideration of race in the admissions process. *Id.* at 944.

The defendants sought to have this Court review the Fifth Circuit's rationale, and particularly its conclusion that diversity was not a compelling governmental interest. The United States filed an amicus brief to support defendants, arguing that, although the Fifth Circuit had affirmed the district court's denial of injunctive relief, "the court's opinion effectively amounts to such an injunction." Brief for the United States As Amicus Supporting Petitioners at 11, *Texas v. Hopwood*, 518 U.S. 1033 (1996) (No. 95-1773) (available at http://www.justice.gov/osg/briefs/1995/w951773w.txt). *Compare* U.S. Br.13 ("A court of appeals' constitutional determination in a case like this thus has an effect similar to an injunction or a declaratory judgment against the government as a whole").

This Court denied the petition. Justice Ginsburg wrote an opinion (joined by Justice Souter) with respect to that denial, agreeing that the question involved was one "of great national importance," but reiterating that this Court reviews judgments, not opinions; that petitioners were improperly "challeng[ing] the *rationale* relied on by the Court of Appeals"; and that the Court needed to await a "final judgment on a program genuinely in controversy before addressing the important issue raised in this petition." *Texas v. Hopwood*, 518 U.S. 1033 (1996) (opinion of Ginsburg, J.) (emphasis in original).

To be sure, the Fifth Circuit's opinion in *Hopwood* caused substantial shifts in the admissions systems of universities under its jurisdiction. *See Fisher v. University of Texas at Austin*, 645 F. Supp. 2d 587, 591-93 (W.D. Tex. 2009) (describing history of University of Texas admissions before and after *Hopwood*), *aff'd*, 2011 WL 135813 (5th Cir. Jan. 18, 2011). But that alone was insufficient for this Court to accept review.

The United States cites *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939) to support its contention that this Court has jurisdiction to hear petitioners' appeal. U.S. Br. 15-17. In that patent infringement case, the District Court ruled that a patent was valid but had not been infringed. *Both* rulings were set forth in the district court's decree, and the defendant appealed the part of the *judgment* that held the patent valid. This Court held that, although "[a] party may not appeal from a judgment . . . for the purpose of obtaining a review of findings he deems erroneous *which are not necessary to support the decree*, . . . here *the decree itself* purports to adjudge the validity of [the patent]." *Electrical Fittings*, 307 U.S. at 242 (emphasis added). This Court held only that the defendant had standing to seek *reformation of the decree*. *Id.* Thus, *Electrical Fittings* hardly undermines the rule that only judgments, and not opinions, are appealable. To the contrary, it confirms that rule.

The United States also points out that the statutes authorizing this Court's appellate jurisdiction do not specify who may invoke that jurisdiction. U.S. Br. 15. Of course, the same can be said of the statutes that provide courts of appeals with jurisdiction over orders and judgments of district courts. 28 U.S.C. §§ 1291, 1292. But even if appeals from non-aggrieved parties were statutorily permissible, Article III provides a separate limitation applicable here. Similarly, even if the historic practice of reviewing judgments, and not statements in opinions was not grounded in Article III in every instance, it is a practice that frequently conflates with Article III concerns. As it does here.

B. The "Equivalence" Argument And *Hewitt*

The United States argues that the opinion of the Ninth Circuit in this case is the same as a declaratory judgment or an injunction and, thus, should be appealable. U.S. Br. 13 ("an effect similar to an injunction or a declaratory judgment against the government as a whole"). It makes no mention of *Hewitt v. Helms*, 482 U.S. 755 (1987), a case that addressed the "equivalence" of an opinion to a judgment in a somewhat different context.

In *Hewitt*, it was the plaintiff-prisoner who made the contention the United States makes here, as part of an argument that he was entitled to attorneys' fees. The Third Circuit had held that his rights had been violated when a misconduct

hearing in prison relied solely on hearsay to find him guilty of the alleged misconduct. It had also summarily affirmed a later district court judgment granting defendants summary judgment on qualified immunity grounds and concluded that plaintiff was nonetheless entitled to attorneys' fees because its earlier constitutional ruling had the effect of a declaratory judgment. *Hewitt v. Helms*, 482 U.S. at 758-59.

The United States filed a brief as amicus supporting the *defendants* in that case. *See* Brief for United States as Amicus Curiae Supporting Petitioners, *Hewitt v. Helms*, 482 U.S. 755 (1987) (No. 85-1630) (available at http://www.justice.gov/osg/briefs/1986/sg860441.txt). It emphasized that the Third Circuit's decision finding a violation of the plaintiff-prisoner's constitutional right "did not hold that [prisoner] was entitled to a declaratory judgment" and "did not direct the district court to address" such claims on remand; and that the prisoner had not renewed any request for declaratory or injunctive relief in the district court. *Id.* It emphasized that the suit was not a class action, and that the lower courts would have had no authority to grant class-wide relief. *Id.*

This Court reversed the Third Circuit. It rejected the possibility that the previous constitutional ruling was tantamount to a declaratory judgment. First, as the United States had argued, this Court found that the prisoner had

not *sought* declaratory or other non-monetary relief in the district court. *Hewitt*, 482 U.S. at 760. Second, the Third Circuit's statements did not affect defendants' actions towards the prisoner, and "a judicial statement that does not affect the relationship between the plaintiff and the defendant is *not* an equivalent [of a judicial judgment]." *Id.* at 761 (emphasis in original). "The only 'relief' [the prisoner] received was the moral satisfaction of knowing that a federal court had concluded that his rights had been violated." *Id.* at 762.

The Court further noted:

> [T]here is a very practical objection to equating statements of law (even legal holdings en route to a final judgment for the defendant) with declaratory judgments: The equation deprives the defendant of valid defenses to a declaratory judgment to which he is entitled. . . . [Had plaintiff sought a declaratory judgment,] [t]he defendants would then have had the opportunity to contest its entry not only on the ground that the case was moot but also on equitable grounds. The fact that a court *can* enter a declaratory judgment does not mean that it *should*.

Id. (emphasis in original).

Finally, and perhaps most importantly, the Court emphasized that considerations relevant to whether to enter a declaratory judgment "may not enter into the decision whether to include statements of law in opinions – or if they do, the *court's decision is not appealable in the same manner as its entry of a declaratory judgment.*" *Id.* at 763 (emphasis added). *Cf. Citizens for Better Forestry v. U.S. Dep't of Agriculture*, 567 F.3d 1128 (9th Cir. 2009) (reversing district court's determination that a prior panel's holding was the functional equivalent of a declaratory judgment entitling plaintiff to attorneys' fees).

Thus, this Court's treatment of the Third Circuit opinion in *Hewitt* demonstrates the distinction between statements in an opinion and a declaratory judgment. Having determined that such statements are not judgments for attorneys' fee purposes, this Court should hold the same thing for purposes of appealability.

C. There Is No Case Or Controversy

Because petitioners were successful in both the District Court and the Ninth Circuit in dismissing plaintiff's claims for damages, there is no "case or controversy" sufficient under Article III of the United States Constitution. This is so because (1) petitioners have no standing to appeal and (2) respondent did not seek review of the Ninth Circuit's dismissal of her damages claims.

While this Court's "standing" cases primarily revolve around whether the plaintiff who initiates the lawsuit has standing under both Article III (pursuant to the familiar three requirements of injury, causation, and redressability) and various prudential considerations, this Court also has made clear that those who invoke an appellate court's jurisdiction must have similar (albeit not identical) interests. *E.g.*, *Arizonans For Official English v. Arizona*, 520 U.S. 43, 64 (1997) ("The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance"); *Diamond v. Charles*, 476 U.S. 54 (1986) (holding that pediatrician did not have standing to appeal circuit court's judgment enjoining certain parts of Illinois's abortion law); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534 (1985) (holding that school board member had not had standing to appeal district court's judgment declaring that school district could not preclude student group from meeting).[2]

---

[2] Prior to the decisions in *Bender*, *Diamond*, and *Arizonans*, this Court said that the rule precluding parties not aggrieved from a judgment from appealing is "one of federal appellate practice . . . derived from the statutes granting appellate jurisdiction and the historic practices of the appellate courts; it does not have its source in the jurisdictional limitations of Art. III." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326 (1980). This statement in *Roper* seems to be in some tension with the later-decided

(continued...)

A plaintiff commencing a lawsuit must be aggrieved (have suffered or will suffer an injury) by a defendant's actual or imminent actions, whereas an appellant must be aggrieved by the judgment being appealed. *E.g.*, *Arizonans For Official English*, 520 U.S. at 66 (expressing doubt as to whether organization that had sponsored state initiative had standing to appeal from a judgment declaring the initiative unconstitutional; "The requisite concrete injury to [sponsor's] members is not apparent. As nonparties in the District Court, [sponsor's] members were not bound by the judgment for [plaintiff]"). When the injury from the judgment is "not apparent," the appellant should make that demonstration to the appellate court. Petitioners have not met that burden.

The Ninth Circuit's judgment as to respondent's Fourth Amendment claim did not harm petitioners. The Ninth Circuit affirmed the district court's dismissal of that claim on qualified immunity grounds.

---

[2](...continued)
cases all holding that appellants must have separate and distinct Article III standing. In any event, the statement in *Roper* is *dicta*. The appellants there were most certainly aggrieved by an interlocutory *order* (denying their motion for class certification), *id.* at 329, and that interlocutory order was merged into the final judgment from which they appealed. *Shaffer v. Carter*, 252 U.S. 37, 44 (1920). The petitioners in *Roper* were hardly appealing from statements in an opinion.

Even if the Ninth Circuit's opinion (contrary to precedent) could be deemed a declaratory judgment, petitioners have not shown how they would be harmed by such a judgment. Petitioners provide no statement (much less evidence) of what their current positions are and whether the lower court's opinion would affect the manner in which they carried out their current or future duties. *Cf.* U.S. Br. 19 (conceding that "an official defendant who has prevailed on qualified-immunity grounds will lack standing to seek further review because there is an insufficient likelihood that he will again engage in the practice that has been ruled unconstitutional").

Nor are the interests of the State of Oregon or Deschutes County adequate to substitute for the interest of an actual appellant. Those entities are not parties, petitioners' efforts to pretend otherwise notwithstanding. *E.g.*, Camreta Brief 41 ("The State recognizes . . . that because the Ninth Circuit ruled that petitioner is entitled to qualified immunity, the State received a favorable judgment. The State also recognized in its petition for certiorari . . ."); *id.* at 43-44. Petitioners cannot invoke the interests of those entities to remedy their own lack of appellate standing. *E.g.*, *Diamond*, 476 U.S. at 62-63 (holding that State of Illinois's status as a party in the Supreme Court, and its letter to the Court stating that its interests were the same as the appellant-pediatrician, were insufficient to provide appellate standing to pediatrician seeking to defend Illinois's abortion

law); *Bender*, 475 U.S. at 544 (holding that petitioner's "status as a School Board member does not permit him to 'step into the shoes of the Board' and invoke its right to appeal"). And, if those entities wanted to preserve the ability to appeal any adverse resolution of the underlying constitutional issue, they could have instructed petitioners to waive their qualified immunity to damages. Camreta Br. 43 n.6 (noting indemnification provisions of Oregon law).

Just as importantly, *respondent* lacks any interest in defending the Ninth Circuit opinion. Respondent will get nothing from this appeal *regardless of what this Court rules* on the Fourth Amendment issue. If it reached the substance, then, this Court would be deciding an important constitutional issue without the "'concrete adverseness which sharpens the presentation of issues upon which the [C]ourt so largely depends for illumination of difficult constitutional issues.'" *Diamond*, 476 U.S. at 62 (*quoting Baker v. Carr*, 369 U.S. 186, 204 (1962)).

The United States glosses over this problem by asserting that "this Court has throughout its history heard and decided numerous cases in which the non-appealing party had little or no interest in defending the lower court's judgment." U.S. Br. 18. We disagree. Such a practice would make a mockery of the "concrete adverseness" that this Court has traditionally sought as part of the Article III "case or controversy" requirement. In

the one actual holding that the United States cites for this proposition, this Court actually found ambiguity in the respondent's position, and concluded that that ambiguity left an ongoing dispute about the propriety of the lower court's judgment. *Pacific Bell Tel. Co. v. LinkLine Communications, Inc.*, 129 S. Ct. 1109, 1117 (2009).

The United States also suggests that cases in which this Court has appointed counsel to argue positions demonstrate that a non-appealing party's lack of interest in the outcome is not an obstacle to Article III jurisdiction. U.S. Br. 18. Of course, the Court's practice of appointing counsel, without any consideration of its implications under Article III, is not precedent on any jurisdictional issue. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 91 (1998) ("drive-by jurisdictional rulings . . . have no precedential effect"). In any event, it is frequently the United States that has had counsel appointed to argue its interests. It is inaccurate to say that the United States lacks an interest in those cases; rather, those are cases in which the official attorneys for the United States have declined, for whatever reason, to make the argument that is in its interests. *Dickerson v. United States*, 538 U.S. 1045 (1999) (inviting *amicus* counsel to argue that a United States statute was constitutional). Moreover, the United States is the respondent in those cases; even where it confesses error and agrees with the petitioner as to the impropriety of the *judgment* of the court

below, a case or controversy still exists because this Court must do *something* to alter that judgment.

Here, of course, it is the respondent herself, not her representatives, that lacks an interest in the outcome of the case. Further, no one is asking this Court to do anything to the Ninth Circuit's judgment dismissing respondent's Fourth Amendment claim.

D. Prudential Reasons Militate In Favor Of Declining To Address Fourth Amendment Issues

Finally, even if this Court had jurisdiction over this appeal, it should decline to address the Fourth Amendment issues, particularly the ones petitioners would like it to.

The Ninth Circuit did *not* hold (contrary to the United States's misrepresentation) that "the interview of S.G. . . . violate[d] the Fourth Amendment." U.S. Br. 6. Rather, it held that petitioners *were not entitled to summary judgment solely* on the ground that the facts, with all factual disputes and inferences from undisputed facts being resolved in respondents' favor, demonstrated that petitioners complied with the Fourth Amendment. *Camreta v. Greene*, 588 F.3d 1011, 1017 n.1, 1021 (9th Cir. 2009). Thus, at least insofar as the Fourth Amendment discussion is concerned, this case is now in an interlocutory

posture. Indeed, if this Court truly had jurisdiction because there were a live case or controversy, then an affirmance of the Ninth Circuit's ruling on the denial of summary judgment should lead to a trial in the district court on the question of whether petitioners *did* violate the Fourth Amendment – although there would be no point to it at all and nothing would turn on the outcome. U.S. Br. 8 (asserting that this Court should "remand for further proceedings").

What is even more remarkable, and which provides even more reason for this Court to decline deciding any constitutional issues, is that *petitioners (and the United States) do not want this Court to resolve whether petitioners were entitled to summary judgment.*

Thus, Camreta asserts that "this Court . . . need not address the reasonableness of the scope of the interview" he conducted. Camreta Br. 38. Indeed, he concedes that this is a complex issue that "ultimately depends on the resolution of heavily disputed facts by the trier of fact." *Id.* at 39. The United States makes a similar plea for judicial avoidance. U.S. Br. 32 ("This Court need not decide in the first instance whether the interview in this case was conducted in a reasonable manner").

As for Alford, he simply ignores the summary judgment posture altogether and asks this Court to do the same. *Compare* Alford Br. 55

("Nothing in this record *demonstrates* that petitioner or Camreta used coercive or intimidating tactics in asking S.G. questions") (emphasis added) *with* J.A. 71 (¶ 9) (S.G. testifying that Camreta would not accept her answers that her father had not touched her improperly and "kept asking me the same questions, just in different ways, trying to get me to change my answers"). *See also* Alford Br. 9-10 (reciting Camreta's version of events).

Petitioners and the United States want this Court to determine whether *every* interrogation of a child abuse victim in school requires a warrant or probable cause. But the Ninth Circuit never held that *every* police interrogation in school requires a warrant or probable cause (nor did respondent ever so argue). The question of whether a non-threatening, five- or ten-minute police interrogation of a possible abuse victim in school based solely on reasonable suspicion would violate the Fourth Amendment simply was not before that court – just as it is not before this Court. Indeed, it is clear that the *length* of petitioners' interrogation was quite an important element in the court below's analysis. *Camreta*, 588 F.3d at 1017 n.1; *id.* at 1023 ("Defendants urge us to conclude, in other words, that while seizing S.G. and interviewing her at home for two hours would have been unreasonable absent probable cause and a warrant or exigent circumstances, it was reasonable to do *a similarly lengthy interrogation* in the same way at S.G.'s school. We

decline to adopt this distinction.") (emphasis added); *id.* at 1032 ("[T]he justification in the record for a seizure lasting two hours is weak"); *id.* ("It is far from clear that it was reasonable for Camreta and Alford to continue to detain S.G. for an entire hour during which she continually denied such abuse."). *See F.C.C. v. Pacifica*, 438 U.S. at 734 (noting that FCC order finding that George Carlin monologue was indecent was "carefully confined to the monologue 'as broadcast'" and holding that the Court would not review general statements in the Commission's order).

Petitioners provide no reason why this Court should bother to answer a hypothetical question about interrogations in general, particularly one that the court below did not address. For this reason as well, this Court should decline to decide the issues petitioners ask it to.

II. THE COURT BELOW DID NOT ERR IN REFUSING TO GRANT PETITIONERS' MOTION FOR SUMMARY JUDGMENT SOLELY ON FOURTH AMENDMENT GROUNDS

A. Seizures For More Than A Few Minutes In Length Generally Require Probable Cause

This Court's precedents regarding the validity of seizures under the Fourth Amendment have developed a two-tiered approach. Virtually all seizures have traditionally required probable

cause. For very short seizures, involving an intrusion far less severe than the norm, the Court has used a balancing test first adopted in *Terry v. Ohio*, 392 U.S. 1 (1968), in which a reasonable suspicion that a short seizure was appropriate might be sufficient where there was a sufficient governmental interest for the seizure and the manner in which the seizure was carried out was not overly intrusive. But "because *Terry* involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope." *Dunaway v. New York*, 442 U.S. 200, 210 (1979). (Alford falsely attributes a quote about "balancing" governmental and individual interests to *Dunaway*. Alford Br. 13.)

Thus, while it is true that "reasonableness" is the touchstone of the Fourth Amendment's text, "[t]he standard of probable cause thus represent[s] the accumulated wisdom of precedent and experience as to the minimum justification necessary to make the kind of intrusion involved in an arrest 'reasonable' under the Fourth Amendment." *Dunaway*, 442 U.S. at 208. It is a "standard applied to all arrests, without the need to 'balance' the interests and circumstances involved in particular situations." *Id. See also Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (confirming that standard). (Alford's contention that *Atwater* did not "impose . . . a requirement . . . of probable cause" for arrests, Alford Br. 22, is thus stunningly inaccurate and disingenuous.) The court below did no more than

apply that rule to petitioners' motion for summary judgment (while resolving factual issues in respondent's favor).

In fact, outside of the *sui generis* context of a customs stop of suspected drug smugglers – *United States v. Montoya De Hernandez*, 473 U.S. 531, 538 (1985) ("the Fourth Amendment's balance of reasonableness is qualitatively different at the international border than in the interior"); *Almeida-Sanchez v. United States*, 413 U.S. 266, 274 (1973) (noting Court's historical distinction between "searches at the border and in the interior") – this Court has never applied anything less than probable cause to any seizure regarding law enforcement more than 30 minutes long. *E.g.*, *Florida v. Royer*, 460 U.S. 491, 502-03 (1983) (holding that airline passenger had been seized in violation of the Fourth Amendment when detectives, after initial questioning in a public area, asked him to go back to a small room where he was questioned further; *Terry* "did not justify the restraint to which [passenger] was then subjected"); *United States v. Place*, 462 U.S. 696, 709 (1983) (equating seizure of an airline passenger's luggage with seizure of his person, and holding that, where it took 90 minutes for the police to bring the luggage to drug-sniffing dogs, the seizure exceeded the scope of a *Terry* stop and had to be justified by probable cause; "The length of the detention of respondent's luggage alone precludes the conclusion that the seizure was reasonable in the absence of probable cause. . . .

[T]he brevity of the invasion of the individual's Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion"); *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975) (holding that border patrol may stop cars based solely on reasonable suspicion that cars may contain aliens who are in the country illegally "because of the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing the border . . . . The officer may question the driver and passengers about their citizenship and immigration status and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause"); *Davis v. Mississippi*, 392 U.S. 721, 722, 728 (1969) (bringing a 14-year old boy in to police headquarters for "fingerprint[ing] and routine question[ing]" violated Fourth Amendment).

Of course, "probable cause" can mean somewhat different things in different contexts. *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967). Here, "probable cause" to seize a nine-year old girl means probable cause to believe (1) that a crime has been committed and (2) that the child is a victim or witness to that crime. Petitioners do not contend that they had such probable cause. Alford Br. 46-48 (arguing that probable cause requirement would be counterproductive).

The law surrounding seizures is equally clear in another (although perhaps less relevant) way: arrests for criminal conduct do not generally require a warrant provided that probable cause is present. *United States v. Watson*, 423 U.S. 411 (1976). Whether, of course, this is also true for seizures of witnesses is a question that this brief does not address at length since it is undisputed that petitioners lacked probable cause.

Thus, the standards in applying the Fourth Amendment to seizures have been far simpler than the standards for searches. For seizures, probable cause is the general rule with basically one very limited exception. For searches, this Court has identified, at one end, various "special needs" and different contexts in which modest searches can be effected consistent with the Fourth Amendment for reasons other than probable cause related to law enforcement. At the other end, there is a complex and not altogether consistent set of rules about when warrants are needed for searches. *See generally California v. Acevedo*, 500 U.S. 565, 581-85 (1991) (Scalia, J., concurring).

This can be explained by the different interests the Fourth Amendment protects. Searches implicate privacy interests, which vary greatly. Such interests are at their height at one's home, are less on the street, and may be even lower in the office of one's employer. But seizures usually implicate the same concerns. They implicate one's liberty to go about one's business.

Place, 462 U.S. at 708 (holding that the detention of an airline passenger's luggage is tantamount to a seizure of the person because it "intrudes on . . . his liberty interest in proceeding with his itinerary"). Further, and particularly relevant here, seizures create anxiety and fear in the person seized. *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976) (noting that the Court views "checkpoint stops in a different light because the subjective intrusion – the generating of concern or even fright on the part of lawful travelers – is appreciably less in the case of a checkpoint stop"). *See also Illinois v. Lidster*, 540 U.S. 419, 425 (2004) (noting that the car stops seeking information regarding a hit-and-run accident were "less likely to provoke anxiety or to prove intrusive" because they were "likely brief"); *Watson*, 423 U.S. at 428 (Powell, J., concurring) ("A search may cause only annoyance and temporary inconvenience to the law-abiding citizen, assuming a more serious dimension only when it turns up evidence of criminality. An arrest, however, is a serious personal intrusion regardless of whether the person seized is guilty or innocent"). *Cf.* Alford Br. 59 (describing S.G. as "a frightened 9-year old girl").

Petitioners and their amici would replace the simple and clear "probable cause" standard for all but the briefest seizures with a dizzying array of factors tossed into an amorphous balancing test that would undermine the clarity of the law. Aside from the impropriety of the factors they identify to

diminish the central role of probable cause in seizures, they grossly undervalue the need for clarity that this Court has stressed:

> But we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review. . . . Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.

Atwater, 532 U.S. at 347. *See also Oliver v. United States*, 466 U.S. 170, 181 (1984) ("This Court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment

standards to be applied in differing factual circumstances."); *Carroll v. United States*, 267 U.S. 132, 159 (1925) (upholding the rule that the police may seize from a car anything unlawfully there, noting that the rule "is a wise one because . . . it is easily applied and understood and is uniform."). *Compare* U.S. Br. 9 (claiming that this Court "has consistently evaluated the constitutionality of [a] seizure under a context-specific reasonableness standard").

As shown below, "complications arise the moment we begin to think about the possible applications of the several criteria [petitioners and their amici] propose" to be tossed into the reasonableness mix to replace probable cause. *Atwater*, 532 U.S. at 348.

B. Petitioners' Criteria Lack Both Coherence And A Fourth Amendment Pedigree

Among the myriad of considerations that petitioners suggest this Court consider in determining whether the initial seizure of S.G. complied with the Fourth Amendment are history, the context of a child abuse investigation, the fact that S.G. was a possible victim of child abuse, and the school setting. These suggestions are misguided.

1. History. – Petitioners misunderstand the role that history should play in determining the propriety of a seizure. This Court does not

break down each specific factual setting to determine whether the common law recognized a right to be free from seizures in precisely that setting. If it did, then presumably probable cause could be abandoned in all automobile searches.

Among the cases that are traditionally cited as supporting a common law analysis for Fourth Amendment protections is *Watson*. *E.g.*, *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995). And in *Watson*, this Court held that "probable cause" was the basis for arrests for criminal conduct under the common law. *Cf. Pierson v. Ray*, 386 U.S. 547, 555 (1967); *id.* at 556-57 ("Part of the background of tort liability, in the case of police officers making an arrest, is the defense of good faith and probable cause"). It has never suggested that the common law had a lower standard for the seizure of witnesses, children, victims, or anyone else. *Cf.* Horace L. Wilgus, *Arrest Without A Warrant*, 22 U. Mich. L. Rev. 541, 820-21 (1924) (in a common law suit against an officer for seizing a suspected insane person, officer had to prove both that the arrestee was insane and that he was a danger to himself or others).

2. Child Abuse Investigations. – Petitioners suggest that child abuse investigations are uniquely difficult making the normal reasonableness standard of probable cause for seizures inapplicable. The United States, on the other hand, acknowledges that the governmental interest in preventing child abuse (intrafamily or

otherwise) is similar to the governmental interest in any efforts to prevent crimes. U.S. Br. 28 n.5.

Crimes of all stripes can be difficult to solve because of a lack of evidence. The inability to find crime perpetrators and remove them from the public risks further crime against others (including children who go to school). *Place*, 462 U.S. at 705 n.5 (noting the difficulties in stopping drug trafficking and concluding that "'[a]s a result, the obstacles to detection of illegal conduct may be unmatched in any other area of law enforcement.'") (*quoting United States v. Mendenhall*, 446 U.S. 544, 562 (1980) (opinion of Powell, J.)). Murder sprees are very serious, but the fact that many perpetrators may be clever in covering up evidence – attacking in places without witnesses, hiding the bodies, leaving no physical evidence – has never been thought grounds for suspending the guarantees of the Fourth Amendment. *Almeida-Sanchez*, 413 U.S. at 273 (holding that automobile search of Border Patrol twenty miles from the border violated the Fourth Amendment because it was effected without consent or probable cause; "The needs of law enforcement stand in constant tension with the Constitution's protection of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards."). Nor can they be here.

3. Witnesses And Victims. – Petitioners and their amici suggest that a different standard

should apply to those not suspected of criminal conduct. They do not explain why an indisputably innocent individual should receive less protection under the Fourth Amendment than a potential criminal.

Petitioners' suggestion also runs into a whole host of practical problems. Police frequently do not know whether the person they are speaking to is or should be a suspect. *E.g.*, *Dunaway*, 442 U.S. 200, 207 (1979) (holding that seizure and interrogation violated the Fourth Amendment even though "police had a 'reasonable suspicion' that petitioner possessed 'intimate knowledge about a serious and unsolved crime.'"); *Davis*, 394 U.S. at 722 (noting that early questioning of defendant "apparently related primarily to investigation of other potential suspects"). The alleged blackmail victim may turn out in some cases to be a statutory rape perpetrator, and vice versa. This is not a problem when the purported victim has voluntarily agreed to an interrogation. But the Fourth Amendment precludes seizing suspected victims and witnesses on anything less than probable cause that they are, indeed, victims or witnesses of an actual crime.

Finally, the assessment of "brief, information-seeking highway stops" in *Lidster* is simply irrelevant here. The much lengthier and far more traumatic questioning of a nine-year old girl about her father's touches are far more likely to "provoke anxiety or to prove intrusive," *id.* at

425, one of the core concerns of the Fourth Amendment prohibition against unreasonable seizures. *Cf. id.* at 426 ("the motorist stop will likely be brief"), 427 ("Viewed objectively, each stop required only a brief wait in line – a very few minutes at most. Contact with the police lasted only a few seconds").

4. School Context. – Finally, petitioners and their amici argue that the seizure of a nine-year old by law enforcement at school should be subject to a lower standard because children's freedom of movement at school is already restricted. *E.g.*, U.S. Br. 30-31.[3]

Schools are not the only places where

---

[3] The United States emphasizes the school context of S.G.'s seizure despite the fact that one of its interests in this case is a statute that apparently permits non-consensual seizures of children to investigate potential child abuse occurring on Indian lands. U.S. Br. 2, 14 (citing 25 U.S.C. § 3206). Of course, that statute apparently authorizes seizures of children in their own homes (§§ 3206(a), (b)) and allows judges to issue warrants to seize children on less than probable cause (§ 3206(d)). None of the arguments the United States makes here would appear to solve these seemingly obvious constitutional infirmities.

So, too, Camreta's suggestion that the State can actually change the scope of Fourth Amendment protections by passing constitutionally questionable legislation that reduces citizens' reasonable expectations of privacy, Camreta Br. 33, is without basis in any of this Court's precedents.

people's movements are restricted by the government. Many government employees presumably need to show up to work each day; citizens make appointments at government offices and in government buildings (including courts) for a wide variety of reasons, and need to be in certain places at certain times. The notion that the police can seize a government employee in her office on something less than probable cause, take her to a conference room against her will, and question her there at noon for several hours, just because her employer expects her to be available for a 2:30 p.m. meeting, should give anyone pause. The United States cites *INS v. Delgado*, 466 U.S. 210 (1984) (U.S. Br. 31), but it misses the point of that case; the employees there were indeed at work, but this Court nonetheless went through an extensive analysis to determine if any of the plaintiffs were "seized" by the federal agents' questioning. *Id.* at 218, 219 n.7 (noting that "respondents [had] no reason to believe that they would be detained if they . . . simply refused to answer" and that several respondents had left the building during the investigation).

This Court has made clear that proper Fourth Amendment analysis considers not just *where* a search or seizure takes place, but *by whom* and *why*. *E.g.*, *Ferguson*, 532 U.S. at 84 (holding that program testing pregnant woman for drugs violated Fourth Amendment; "The fact that positive test results were turned over to the police . . . provides an affirmative reason for enforcing

the strictures of the Fourth Amendment"); *id.* at 79 n.15 (noting that precedent distinguishes "searches in schools conducted by school authorities alone from those conducted with law enforcement agencies"); *O'Connor v. Ortega*, 480 U.S. 709, 717 (1987) (holding that employees in government offices had reasonable expectations of privacy in their place of work even though "[t]he operational realities of the workplace . . . make *some* employees' expectations of privacy unreasonable when an intrusion is by a supervisor *rather than a law enforcement official.*") (plurality op.) (emphasis added); *id.* at 731 (Scalia, J., concurring) ("The identity of the searcher (police v. employer) is relevant . . . to whether the search of a protected area is reasonable").

The fact that the patients in *Ferguson* had every expectation that medical professionals employed at a state hospital would view their blood test results did not warrant a conclusion that the police could mandate that those tests be taken and view the results consistent with the Fourth Amendment. Similarly, the fact that parents send their children to school knowing that their "liberty" will be restricted by *school officials* does not mean that the Fourth Amendment does not apply in full when the student is seized in school by other state officials. Such officials are not entrusted with the "custodial and tutelary" responsibilities over public school children that public school officials have. *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995).

C. Other Factors Militate In Favor Of Strict Adherence To Fourth Amendment Standards

Petitioners and their amici ignore two important factors that weigh heavily in favor of the traditional reasonableness standard of "probable cause." First, the seized party here was a nine-year old girl. Second, she and her family had independent constitutional rights.

1. Children Cannot Consent As Adults Do. – Government officials do not violate the Fourth Amendment by going up to someone and asking questions. *E.g.*, *Royer*, 460 U.S. at 497. "The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way." *Id.* at 497-98. Such an encounter is not a Fourth Amendment issue because it is deemed voluntary.

The degree to which a nine-year old's agreement to cooperate or to answer questions under *any* circumstances – much less, the ones here where no one has even *argued* that S.G. voluntarily went with her guidance counselor and spoke with petitioners – is a far more difficult question. Under the common-law, for example, a person charged with kidnapping a child could not claim that the child voluntarily went with him. The law was (and is) that a child could not consent. *E.g.*, *Commonwealth v. Colon*, 726 N.E.2d

909, 911 (Mass. 2000) (relying upon the common law, and concluding that a 12-year old could not consent to her own kidnapping); *State v. Hoyle*, 194 P. 976, 977 (Wa. 1921) (discussing "tender years" doctrine under the common law; "[a] child of tender years was regarded as incapable of consenting to its own seizure . . . ").

Similarly, this Court has repeatedly noted that the standards for determining whether a minor's confession was "voluntary" for Fifth Amendment purposes requires a more careful and nuanced weighing of factors – including the child's age – than a similar analysis for an adult. *Fare v. Michael C.*, 442 U.S. 707, 725 (1979) (applying a "totality-of-the-circumstances" approach to a juvenile's waiver of *Miranda* rights, including "the juvenile's age, experience, education, background, and intelligence. . . ."). *See also Gallegos v. Colorado*, 370 U.S. 49, 54 (1962) (recognizing that "a 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police," and that such a person is "not equal to the police in knowledge and understanding of the consequences . . . and . . . unable to know how to protect his own interests or how to get the benefits of his constitutional rights."); *Hayley v. Ohio*, 332 U.S. 596, 599 (1948) (noting that when "a mere child–an easy victim of the law–is before us," the Court must exercise special care, as "[t]hat which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.")

This consideration of consent can be seen in one of this Court's recent Fourth Amendment cases as well. In *Safford Unified School District #1 v. Redding*, 129 S. Ct. 2633 (2009), this Court considered school officials' search of a 13-year old girl for pain relief pills. After being questioned, the girl had "agreed to let [a school official] search her belongings," *id.* at 2638, and her backpack was searched. This Court nonetheless analyzed whether the school official had enough justification for that search, and, indeed, insisted that "[t]here is no question that justification for the school officials' search [of her backpack] was required . . . " *Id.* at 2641 n.3. That is, the girl's agreement alone to have her backpack searched was insufficient for Fourth Amendment purposes. Such consent, of course, would have been dispositive for an adult.

The fact that children cannot consent to a seizure suggests that law enforcement officials should limit their contacts with them. The normal standard for reasonableness as to seizures, *viz.*, probable cause, can effectively limit these contacts to situations where such involuntary, non-consensual contacts are truly needed.

2. Family Rights. – The interest of parents in the upbringing of their children is the seminal "fundamental" liberty interest protected by the Fourteenth Amendment. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("'The liberty interest at issue in this case -- the interests of

parents in the care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by this Court.") It protects the rights of parents to make important decisions for their children. *Id.* at 66. *Cf. Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000) (children have the right to have important medical decisions made by their parents).

Whether or not to cooperate with state authorities in their efforts to seek information from a child is a decision of great concern, one that normally would be entrusted to a parent. To be sure, as petitioners argue, there may be situations where a parent might have a conflict of interest; the state officials may be seeking information about improper conduct of the parent. But precisely because such efforts to pit a child against one of her parents is so fraught with consequences for the entire family – as they were here – the fundamental rights of parents and children should not be casually overcome on the mere suspicion that there is a conflict of interest. Again, the fundamental liberty interest of familial association strongly suggests that nothing less than probable cause should warrant a child's seizure to extract a condemnation of one of her parents.

CONCLUSION

This Court should conclude that it lacks jurisdiction to assess the Ninth Circuit's opinion regarding respondent's Fourth Amendment claim, or, alternatively, that it should not, in its discretion, exercise whatever jurisdiction it might have. Should the Court reach that issue, it should agree with the Ninth Circuit that there were genuine issues of material facts precluding a grant of summary judgment to the petitioners solely on the ground that they complied with the Fourth Amendment.

Respectfully submitted,

Michael E. Rosman
Center for Individual Rights
1233 20th St. NW, Suite 300
Washington, DC 20036
(202) 833-8400

Attorney for Amicus

Nos. 09-1454 and 09-1478

In the Supreme Court of the United States

BOB CAMRETA, PETITIONER

v.

SARAH GREENE, PERSONALLY AND AS A NEXT FRIEND FOR S.G., A MINOR, AND K.G., A MINOR, RESPONDENT

(ADDITIONAL CAPTION ON REVERSE)

On Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR CENTER FOR LAW AND EDUCATION, LEARNING RIGHTS LAW CENTER, CHICAGO COALITION FOR THE HOMELESS, PACER CENTER, AND PARENTS UNITED FOR RESPONSIBLE EDUCATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

GENE C. SCHAERR
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
(202) 282-5000

LINDA T. COBERLY
Counsel of Record
LINDSEY M. MARCUS
W. KYLE WALTHER
KATE ZELL
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600
LCoberly@winston.com

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

Nos. 09-1454 and 09-1478

In the Supreme Court of the United States

JAMES ALFORD, DESCHUTES COUNTY DEPUTY SHERIFF, PETITIONER

v.

SARAH GREENE, PERSONALLY AND AS A NEXT FRIEND FOR S.G., A MINOR, AND K.G., A MINOR, RESPONDENT

On Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR CENTER FOR LAW AND EDUCATION, LEARNING RIGHTS LAW CENTER, CHICAGO COALITION FOR THE HOMELESS, PACER CENTER, AND PARENTS UNITED FOR RESPONSIBLE EDUCATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

GENE C. SCHAERR
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
(202) 282-5000

LINDA T. COBERLY
Counsel of Record
LINDSEY M. MARCUS
W. KYLE WALTHER
KATE ZELL
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600
LCoberly@winston.com

CONTENTS

Page

INTRODUCTION AND INTERESTS OF *AMICI CURIAE* 1

BACKGROUND 6

SUMMARY OF ARGUMENT 7

ARGUMENT 9

I. *T.L.O.* Did Not Make Public Schools Environments Of Reduced Privacy Rights In The Name Of Any Governmental Interest 9

II. Custodial Police/CPS Interrogations On School Grounds Are Inconsistent With, And Disruptive Of, The Mission And Function Of Public Schools 11

A. Allowing interrogations like S.G.'s is inconsistent with public schools' interests in maintaining positive and trusting relationships with students and parents 12

B. Allowing the classroom to be disrupted for purposes unrelated to education will have a negative impact on learning 17

III. Schools Are Far From Ideal Locations For Custodial Police/CPS Interrogations, From The Perspective Of Both The Child And The Investigation 19

A. Custodial police/CPS interrogations at school can embarrass and

traumatize children, ruining their experience of school as a safe space..... 20

B. Children may feel trapped in school-based, custodial police/CPS interrogations. 22

C. Children are more suggestible in the school environment..... 24

IV. Parents Have No Expectation That Their Children Will Be Subject To Warrantless, Custodial Police/CPS Interrogations At School Without Their Consent..... 27

V. Relaxing Constitutional Requirements For Police And CPS Agencies In Public Schools Will Give Them Incentives To Bypass Fourth Amendment Requirements..... 33

CONCLUSION 35

TABLE OF AUTHORITIES

Page(s)

CASES

Couture v. *Bd. of Educ. of Albuquerque Pub. Sch.*,
535 F.3d 1243 (10th Cir. 2008) 23

Greene v. *Camreta*,
588 F.3d 1011 (9th Cir. 2009) 14, 32, 34

Meyer v. *Nebraska*,
262 U.S. 390 (1923) 27

New Jersey v. *T.L.O.*,
469 U.S. 325 (1985) ..... *passim*

Parker v. *Hurley*,
514 F.3d 87 (1st Cir. 2008) 31

Pierce v. *Society of the Sisters of the Holy Names of Jesus and Mary*,
268 U.S. 510 (1925) 27

Tinker v. *Des Moines Indep. Cmty. Sch. Dist.*,
393 U.S. 503 (1969) 17

Troxel v. *Granville*,
530 U.S. 57 (2000) 27

Vernonia Sch. Dist. 47J v. *Acton*,
515 U.S. 646 (1995) 23

Wallace by Wallace v. *Batavia Sch. Dist. 101*, 68 F.3d 1010 (7th Cir. 1995) 23

CONSTITUTION, STATUTES, AND REGULATIONS

34 C.F.R. § 303.12 26

20 U.S.C.A. § 1232g 30

20 U.S.C.A. § 1232g(b)(1) 30

20 U.S.C.A. § 1232h 29

20 U.S.C.A. § 1414 29

20 U.S.C.A. § 1415(b) 29

20 U.S.C.A. § 6318 30

42 U.S.C.A. § 11431(2) 22

42 U.S.C.A. § 11432(e)(3)(C)(i)(III)(dd) 22

42 U.S.C.A. § 11432(g)(1)(J)(i) 22

42 U.S.C.A. § 11432(g)(3)(B) 30

42 U.S.C.A. § 11432(g)(3)(E) 30

ARIZ. REV. STAT. ANN. § 15-102 31

ARIZ. REV. STAT. ANN. § 15-102(A)(3) 31

CAL. EDUC. CODE § 49451 31

CAL. EDUC. CODE § 51938 31

MICH. COMP. LAWS ANN. § 380.1507(3) 31

NEV. REV. STAT. § 389.065(4) 31

OHIO REV. CODE ANN. § 3313.472 29

OR. REV. STAT. ANN. § 336.465(1)(a) 29

OR. REV. STAT. ANN. § 336.465(1)(b) 31

Pub. L. 111-296, 124 Stat. 3183 30

S. Ct. R. 37.6 1

TEX. EDUC. CODE ANN. § 28.004(i) 31

U.S. CONST. AMEND. IV ..... *passim*

UTAH ADMIN. CODE § R277-474-1(H) 31

UTAH CODE ANN. § 53A-11-1210 30

OTHER AUTHORITIES

1 Ronna Greff Schneider, EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIG. § 2.3 (1st ed. 2010) 13

ANTHONY S. BRYK AND BARBARA SCHNEIDER, TRUST IN SCHOOLS: A CORE RESOURCE FOR IMPROVEMENT (American Sociological Ass'n 2002) 16

Anthony S. Bryk and Barbara Schneider, *Trust in Schools: A Core Resource for School Reform*, 60 EDUC. LEADERSHIP 40 (March 2003) 16, 17

BOHANNAN *ET AL.*, OREGON DEP'T OF JUSTICE, OREGON INTERVIEWING GUIDELINES (2004) 26

Chicago Public Schools, Head Start Child Development Program 26

David Rigsby, *Sex Education in Schools*, 7 GEO. J. GENDER & L. 895 (2006) 31

Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413 (2005-06) 33

ELLEN L. BASSUK, M.D., *ET AL.*, THE NATIONAL CENTER ON FAMILY HOMELESSNESS, UNDERSTANDING TRAUMATIC STRESS IN CHILDREN (2006) 13

Erna Olafson, *Children's Memory and Suggestibility*, in INTERVIEWING CHILDREN ABOUT SEXUAL ABUSE (Kathleen Coulborn Faller, 2007).....26, 27

G. Richardson *et al.*, *Interrogative Suggestibility in an Adolescent Forensic Population*, 18 J. ADOLESCENCE 211 (1995).....26

II LAWRENCE KOHLBERG, ESSAYS ON MORAL DEVELOPMENT: THE PSYCHOLOGY OF MORAL DEVELOPMENT (1st ed. 1984).....25

National Center on Family Homelessness, Fact Sheet on Children.....13

Norris M. Haynes *et al.*, *It Takes a Whole Village: The SDP School*, in RALLYING THE WHOLE VILLAGE: THE COMER PROCESS FOR REFORMING EDUCATION 42 (James P. Comer *et al.*, eds., 1996) 17

PAUL E. BARTON AND RICHARD J. COLEY, EDUCATIONAL TESTING SERVICE, PARSING THE ACHIEVEMENT GAP II (2009) 16

Robert W. Blum, *A Case for School Connectedness*, 62 EDUC. LEADERSHIP 16 (Apr. 2005) 15

Sarah H. Ramsey, *Children in Poverty: Reconciling Children's Interests with Child Protective and Welfare Policies*, 61 MD. L. REV. 437 (2002) 33

Shannon Suldo *et al.*, *Associations Between Student-Teacher Relations and Students' Academic and Psychological Well-Being*, 37 NASP COMMUNIQUÉ 14 (Oct. 2008) 15, 16

Spence Rogers & Lisa Renard, *Relationship-Driven Teaching*, 57 EDUC. LEADERSHIP 34 (Sept. 1999) 21

Thomas Grisso *et al.*, *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. HUM. BEHAV. 333 (Aug. 2003) 25

U.S. Dep't of Educ., National Ctr. for Educ. Statistics, Digest of Educ. Stats. 18

U.S. Dep't of Health & Human Servs., About Head Start 26

INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

The Center for Law and Education, Learning Rights Law Center, Chicago Coalition for the Homeless, PACER Center, and Parents United for Responsible Education respectfully submit this brief *amicus curiae* to highlight the ways in which public schools, as such, are not appropriate environments for conducting custodial police/child protective services ("CPS") interrogations of children.[1] From their vantage point as organizations that work with families, schools, and community organizations to ensure that all children have access to high-quality education, *amici* are in a unique position to provide insight into the important relationships and educational issues at stake in the case.

Petitioners and their supporting *amici* would have this Court expand the scope of the school-based "special needs" exception to the Fourth Amendment's search and seizure requirements (*New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985)) to reach any encounter a schoolchild has with a government official on school grounds, even if that encounter has nothing to do with education. Effectively, they hope this Court will permit law enforcement officers and CPS workers to bypass traditional Fourth Amendment protections whenever they conduct custodial police/CPS

---

[1] Counsel for all parties have consented to the filing of this brief. Letters evidencing consent are on file with the Clerk. Pursuant to S. Ct. R. 37.6, *amici curiae* certify that no counsel for a party to this action authored any part of this brief, nor did any person or entity, other than the *amici*, their members, or their counsel make a monetary contribution to fund the preparation or submission of this brief.

investigations in schools. This effort finds no support in *T.L.O.* and its progeny.

Moreover, this effort is bad for education and bad for students. Sanctioning school-based, custodial police/CPS interrogations absent a warrant or court order, exigent circumstances, or parental consent will negatively affect the school environment by threatening the relationships between educators, students, and parents, and by traumatizing children in what should be a safe and nurturing environment.

The ***Center for Law and Education, Inc.*** ("CLE") is a national non-profit advocacy organization with offices in Boston and Washington, D.C., that works with parents, advocates, and educators to improve the quality of education for all students, and in particular, indigent students. One of a few national organizations rooted in both civil rights and school reform, CLE is focused on bringing the two together to address systemic barriers that impede low-income students, who are disproportionately students of color and students with disabilities, from accessing a rigorous curriculum aligned to state standards through effective instruction from qualified teachers. In working to remove such barriers, it is critical that students from protected groups are not denied access to learning by constructive exclusion from school through inappropriate programming and services, or by constructive expulsion through abusive disciplinary or other unlawful practices. CLE seeks to ensure that students who are entitled to services under Title I of the Elementary and Secondary Education Act ("ESEA") and the Individuals with Disabilities Education Act ("IDEA") remain in school and receive an appropriate, quality education

designed to prepare them for post-secondary education and employment.

Through its role with the American Bar Association's Commission on Youth at Risk, CLE took the lead in developing three formal resolutions, along with extensive accompanying reports, that were adopted by the ABA House of Delegates in 2009. The resolutions promote a variety of coordinated actions to advance the educational rights of all children, namely: (1) the right to a high-quality education program; (2) the right to remain in school; and (3) the right to resume a high-quality education program, for students who have left school.

The ***Learning Rights Law Center*** ("LRLC") is a Los Angeles-based non-profit organization with a mission to ensure that students have equitable access to the public education system. LRLC focuses its efforts on students with learning disabilities or difficulties, students involved or at risk of becoming involved in the child welfare and/or juvenile justice systems, and students not accessing the public school system because of disability, homelessness, or other factors. LRLC advocates for justice in education through a variety of initiatives on behalf of low-income students, including parent training and organizing, administrative hearings, and civil litigation. LRLC advocates for system change through training probation officers, social workers, teachers, administrators, and other professionals working with high-risk students not accessing the public school system.

The ***Chicago Coalition for the Homeless*** ("CCH") is a community-based non-profit Illinois corporation whose mission is to understand and address the

problem of homelessness throughout Illinois and most particularly in the Chicago metropolitan area. Much of CCH's work focuses on the needs of families and children who live in extreme poverty and suffer the experience of homelessness. CCH is especially concerned about accessing quality pre-school, elementary, secondary, and post-secondary education for homeless children and youth as a key to alleviating their intense poverty.

For more than thirty years, CCH has worked extensively with homeless parents, school staff, and administrators to ensure that the educational rights of homeless students are respected and implemented, including ensuring that these often-traumatized children and youth are well-treated and not stigmatized or segregated in their school environment. CCH staff have published and generated numerous articles and training materials in this field, including, most recently, co-authoring an American Bar Association publication, EDUCATING CHILDREN WITHOUT HOUSING: A PRIMER ON LEGAL REQUIREMENTS AND IMPLEMENTATION STRATEGIES FOR EDUCATORS, ADVOCATES AND POLICYMAKERS (3d ed. 2009). CCH's Law Project regularly represents homeless children and youth in administrative hearings and litigation and advocates to secure their basic needs, including educational needs.

PACER Center is a parent training and information center for families of children and youth with all disabilities, from birth through 21 years old. Located in Minneapolis, it serves families across the nation. Parents can find publications, workshops, and other resources to help make decisions about

education, vocational training, employment, and other services for their children with disabilities.

The mission of PACER Center is to expand opportunities and enhance the quality of life of children and young adults with disabilities and their families, based on the concept of parents helping parents. PACER Center is unique in that it serves children with *all* disabilities: learning, physical, emotional, mental, and health. PACER also works in coalition with 18 disability organizations.

Parents United for Responsible Education ("PURE") is a non-profit membership organization and nationally recognized public school parent advocacy group. Based in Chicago, PURE strives to build support for and enhance the quality of public education in the city of Chicago and across the United States by informing parents about educational issues, bringing the views of parents into the school decision-making process, and acting as an advocate for parents in their relationships with school administration.

Collectively, *amici* have a substantial interest in the issue now before the Court, as advocates for the rights of children generally, and specifically as advocates for children and families in public schools. *Amici* have extensive experience working with schools, identifying best practices, and advocating for reform in order to ensure that schools are providing the best education possible to all students, including those children who are more vulnerable for reasons such as homelessness or disability.

BACKGROUND

This is a case about a nine-year-old girl, S.G., who was unexpectedly pulled out of her classroom at public school by an administrator, and then put in a conference room near the principal's office with two adult males she did not know—a uniformed law enforcement officer with a visible firearm, and a CPS caseworker. Br. for Resp'ts at 1-2, *Camreta* v. *Greene* and *Alford* v. *Greene*, Nos. 09-1454 and 09-1478 (Jan. 24, 2011). S.G. was not told why she was taken to this room, and she was afraid. *Id.* at 2. Neither of the men knew that S.G. suffered from developmental delays related to speech, verbal reasoning, and overall reasoning, and that she received special education services for her "communication disorder." *Id.* at 3.

Over the course of two hours (a period during which S.G. would otherwise have been in class), S.G. was interrogated by the CPS worker about alleged sexual abuse by her father. The law enforcement officer and the CPS worker had not obtained a court order or warrant allowing them to interview S.G. *Id.* at 3 n.4. Nor did they obtain parental consent before effecting the seizure of this young child; indeed, they did not even inform S.G.'s parents that they would be talking to her at school. *Id.* at 2-3. And this was not an emergency situation in the CPS worker's view: he had learned of the allegations three or four days before showing up at S.G.'s school to interrogate her. *Id.* at 2.

During the two-hour seizure, S.G. believed (correctly) that she was not free to leave without the permission of the two adult strangers. *Id.* at 4. She was asked the same question over and over: whether

some of her father's touches "were bad touches." *Id.* at 3. She repeatedly answered "no," to the dissatisfaction of the CPS worker, who responded, "No that's not it." She was told things about child sexual abuse that she had never heard before. *Ibid.*

Afraid that the school bus she could see out the window would leave without her at the end of the day, S.G. decided to lie in order to get out of the confined room and the uncomfortable situation. *Id.* at 3-4. She told the officer and the CPS worker what she thought they wanted to hear—"yes" to the "bad touch" questions—and then was allowed to leave. *Id.* at 4. S.G. was clearly traumatized by the interrogation: later that night S.G. could not eat dinner and vomited five times. *Ibid.*

The trauma to S.G. continued, as she and her sister were removed from their home and placed in foster care for three weeks. *Id.* at 11. Forensic interviews and physical examinations by specially trained professionals revealed no evidence that either S.G. or her sister had been abused. *Ibid.* Ultimately, the charges filed against S.G.'s father were dropped, and S.G. and her sister were allowed to return home. *Id.* at 12.

SUMMARY OF ARGUMENT

Petitioners urge the Court to hold, among other things, that the public school is a place in which already vulnerable individuals—children—have a reduced expectation of privacy over *all* aspects of their lives, irrespective of any nexus to education. Br. for Pet'r James Alford at 50-53, *Alford* v. *Greene*, No. 09-1478 (Dec. 10, 2010); Br. for Pet'r Bob Camreta at 30-34, *Camreta* v. *Greene*, No. 09-1454 (Dec. 9, 2010).

In doing so, Petitioners ignore the fundamental purpose of the school-based "special needs" exception to the Fourth Amendment—*T.L.O.*, 469 U.S. 325, and its progeny—which is to ensure that school personnel are able to carry out the educational mission of schools while maintaining discipline, order, and safety in the schoolhouse. *T.L.O.* did not diminish children's constitutional rights in general, nor did it authorize government intrusion for any and all purposes based simply on a child's physical presence in the school building.

In evaluating Petitioners' efforts to make the public school a place in which student privacy interests are significantly compromised for purposes of custodial police/CPS interrogations, *amici* respectfully request that the Court take into account the characteristics of public schools that counsel *against* using them as outposts for this purpose, absent a warrant or court order, parental consent, or exigent circumstances. Additionally, *amici* highlight negative implications of using public schools for this purpose.

First, the mission of schools differs from the mission of law enforcement and CPS. Regular use of public schools for custodial police/CPS interrogations threatens the mission of public schools, as well as the relationships that are essential to a positive school environment and high-quality education for students.

Second, although schools are generally considered safe environments in which children receive nurturing, guidance, and support from teachers and administrators, certain inherent aspects of the school environment elevate the risk that custodial police/CPS interrogations (i) will be traumatizing for

the child, and (ii) will result in the child's providing inaccurate information to questioners.

Third, warrantless, non-exigent custodial police/CPS interrogations keep parents from doing what they normally have the right to do under state legislation and school board policies—oversee, and to some extent approve, what their children are exposed to at school. Parents do not and need not expect a wholesale surrender of their rights to exercise care, custody, and control over their children during school hours. As a result, the changes Petitioners advocate can threaten relationships between schools and parents, to the detriment of student learning.

Finally, if this Court sanctions the use of public schools for warrantless, non-exigent custodial police/CPS interrogations—that is, if this Court accepts the idea that children have reduced Fourth Amendment protections when on school grounds even for government purposes unrelated to school—law enforcement officers and CPS workers will have increased incentives to conduct interrogations of children on school grounds for the sake of convenience, bypassing the traditional constitutional requirement of a warrant based on probable cause.

For all these reasons, *amici* urge this Court to reject Petitioners' view and maintain the constitutional rights of children in public schools.

ARGUMENT

I. *T.L.O.* Did Not Make Public Schools Environments Of Reduced Privacy Rights In The Name Of Any Governmental Interest

The limited exception to traditional Fourth Amendment protections enunciated in *T.L.O.* exists

to allow *school personnel* to carry out the school's educational mission. 469 U.S. 325. It is not a blanket rule that provides reduced constitutional protections whenever the government acts on school grounds—especially not when the government action results in the interrogation of a young child in the presence of police officers about sensitive topics unrelated to the child's education. In fact, in *T.L.O.*, the Court expressly declined to consider the proper standard for searches carried out by parties other than, or in addition to, school personnel:

> We here consider only searches carried out by school authorities *acting alone and on their own authority*. This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question.

Id. at 342 n.7 (emphasis added).

In *T.L.O.*, the Court explained that the *school's* "legitimate need to maintain an environment in which learning can take place" must be balanced with the "schoolchild's legitimate expectations of privacy." *Id.* at 340. The balance the Court struck with the school-based special needs standard[2] is meant to ensure "that the interests of students will

---

[2] The reasonableness of a Fourth Amendment search or seizure within the school setting, as dictated by the Court, depends on whether it was "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 341.

be invaded no more *than is necessary to achieve the legitimate end of preserving order in the schools.*" *Id.* at 343 (emphasis added). Accordingly, *T.L.O.*'s narrow exception to Fourth Amendment protections is properly tailored to enable school authorities to carry out educational purposes and maintain discipline, order, and school safety.

None of these educational concerns was present in S.G.'s case. Nor was there any emergency: CPS did not act until three or four days after it was given information about S.G.'s alleged abuse. Instead of following the proper procedures—demonstrating probable cause to obtain a court order or warrant—the CPS worker brought a law enforcement officer with a visible, holstered weapon to the child's school and interrogated the child for two hours on matters unrelated to school.

There is a critical difference between school personnel acting alone, in the interest of the proper education of their students (the subject of *T.L.O.* and other cases in its vein) and school personnel acting alongside police officers or social workers to carry out objectives external to children's education. In the context of public school, the special needs exception relates to the special educational needs of administrators and teachers to teach students and maintain order in the schoolhouse. This Court should continue to recognize this essential limitation.

II. Custodial Police/CPS Interrogations On School Grounds Are Inconsistent With, And Disruptive Of, The Mission And Function Of Public Schools

Using public schools to conduct warrantless, custodial police/CPS interrogations of children cuts

against the mission of public schools, threatens important relationships between educators, students, and parents, and disrupts student learning.

A. Allowing interrogations like S.G.'s is inconsistent with public schools' interests in maintaining positive and trusting relationships with students and parents.

As the California State Association of Counties points out, teachers "are not trained child abuse investigators or interviewers. That's not their job. It's the job of social workers and police officers."[3] The *amici* represented here agree: It is absolutely not the job of school teachers to investigate criminal allegations of abuse and neglect. To take this argument one logical step further, the schoolhouse is not an appropriate place for custodial police/CPS interrogations.

The mission of public education is not one and the same as the mission of law enforcement or CPS—even though all three government divisions undoubtedly prioritize the safety and wellbeing of children. Schools exist to educate—to equip children with knowledge and skills so they can lead independent lives as contributing members of society. The core responsibilities of public schools "include the development of intellectual skills and literacy training, socialization, citizenry preparation to

---

[3] Br. for Cal. State Ass'n of Counties *et al.* as *Amici Curiae* In Support of Petitioners' Writ of *Certiorari*, *Camreta* v. *Greene*, No. 09-1454 (July 1, 2010), 2010 WL 2665553, *17.

ensure the effective functioning of democracy, and the inculcation of community values."[4]

The public schools' mission as dictated by pedagogical need and federal policy and law includes addressing the needs of a wide array of students who have difficulties which impact their ability to learn. This array includes, among others, students with disabilities and students experiencing homelessness or poverty or violence, for whom the imposition of a law enforcement interrogation runs counter to effective education strategies. Indeed, for children who arrive at school with histories of trauma,[5] such as those experiencing homelessness, additional stress may fracture their ability to have a positive experience at school.[6] Creating daily routines, predictable and safe adult interactions, caring support, positive behavioral and academic expectations, safe and age-appropriate space, and distraction from traumatizing events are all important to promoting effective learning.[7]

On the other hand, the objectives of law enforcement and CPS workers in conducting

---

[4] 1 Ronna Greff Schneider, EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIG. § 2.3 (1st ed. 2010).

[5] National Center on Family Homelessness, Fact Sheet on Children, http://www.familyhomelessness.org/children.php?p=ts (last visited Jan. 26, 2011) (referring to the "barrage of stressful and traumatic experiences" of homeless children and youth and noting "profound effects" on development and learning).

[6] *Ibid.*

[7] ELLEN L. BASSUK, M.D., *ET AL.*, THE NATIONAL CENTER ON FAMILY HOMELESSNESS, UNDERSTANDING TRAUMATIC STRESS IN CHILDREN, 3-5 and 7-11 (2006), http://www.familyhomelessness.org/media/91.pdf.

interrogations on school grounds differ significantly from those of educators. At a basic level, law enforcement and CPS workers are questioning children about incredibly personal, likely traumatizing events (whether true or not) in a manner they hope will elicit detailed and extensive information. In S.G.'s case, the questioning was relentless and aggressive. The result can be traumatizing for a child, as it was for S.G. This, in turn, can significantly impair the relationship between students and school personnel who subjected the students to the school-based interrogation in the first place.

The relationship between educators and students is a special one. As recognized by the Ninth Circuit:

> [P]ublic schools have a relationship with their students that is markedly different from the relationship between most governmental agencies, including [Child Protective Services], and the children with whom they deal. Constitutional claims based on searches or seizures by public school officials relating to public school students therefore call for an analysis * * * that is different [from that for searches or seizures by caseworkers].

Greene v. *Camreta*, 588 F.3d 1011, 1024 (9th Cir. 2009) (quoting *Tenenbaum* v. *Williams*, 193 F.3d 581, 607 (2d Cir. 1999)).

As Justice Powell noted in his *T.L.O.* concurrence, there is a markedly different relationship between school authorities and students than between students and law enforcement. While the former have

a "commonality of interests," the latter are more likely to have an adversarial relationship. 469 U.S. at 349-50 (Powell, J., concurring). Positive and supportive relationships between teachers and students are an important factor associated with higher student achievement and psychological well-being.[8] When students feel connected to their school environment and believe that their teachers "care about their learning and about them as individuals," the students are more likely to experience academic success and less likely to engage in behaviors such as substance abuse, attempted suicide, truancy, fighting, bullying, and vandalism.[9]

Indeed, the rule Petitioners seek may have negative effects even with respect to preventing and stopping child abuse. As many of the briefs to the Court explain, teachers and educators are "mandatory reporters," which means that they must contact CPS if they have reason to suspect child abuse. As a general principle, we as a society *want* children to talk to their teachers and school administrators when they are in trouble or facing dangers, and to trust teachers with sensitive and even potentially parent-incriminating information. Keeping custodial police/CPS investigations away from the school setting will help preserve the special, trusting relationship between children and their

---

[8] Shannon Suldo *et al*, *Associations Between Student-Teacher Relations and Students' Academic and Psychological Well-Being*, 37 NASP COMMUNIQUÉ 14, 15 (Oct. 2008).

[9] Robert W. Blum, *A Case for School Connectedness*, 62 EDUC. LEADERSHIP 16, 16-17 (Apr. 2005).

educators that protects and benefits children.[10] If a child's conversation with a teacher about possible abuse results in CPS and police officers arriving *at the school* to conduct a disruptive, embarrassing, and/or traumatizing custodial interrogation, the child may be deterred from seeking help from school personnel. *Amici* believe that it is in a child's best interest that she trust her teachers and school administrators enough to talk with them openly about harmful events that are happening outside of school, without fear that such disclosure will change her *school* experience as a result of a police-accompanied CPS investigation *at school* about her home life.

Perhaps equally as important as the relationship between schools and students is the relationship between schools and parents. In carrying out their educational functions, schools interact regularly with parents *as allies*, recognizing that parental involvement contributes to a nurturing and productive school community,[11] as well as improved student performance.[12] Conversely, where trust between parents and educators is compromised, student learning suffers.[13] A lack of trust in the

---

[10] Suldo, *supra* note 8, at 15; ANTHONY S. BRYK AND BARBARA SCHNEIDER, TRUST IN SCHOOLS: A CORE RESOURCE FOR IMPROVEMENT 31 (American Sociological Ass'n 2002).

[11] Anthony S. Bryk and Barbara Schneider, *Trust in Schools: A Core Resource for School Reform*, 60 EDUC. LEADERSHIP 40, 43 (March 2003).

[12] PAUL E. BARTON AND RICHARD J. COLEY, EDUCATIONAL TESTING SERVICE, PARSING THE ACHIEVEMENT GAP II 18 (2009), http://www.ets.org/Media/Research/pdf/PICPARSINGII.pdf.

[13] Bryk & Schneider, *supra* note 11, at 41-44.

school environment harms the educational success of children—especially children who are most at risk for educational failure.[14]

When law enforcement and CPS conduct custodial interrogations on school grounds, they are investigating allegations that are typically *against* parents. When the school acquiesces in such interrogations absent a warrant, court order, or exigent circumstances, and fails to seek parental consent, this could alienate parents from their children's schools and deter parents' oversight and involvement in their children's education, to the detriment of student learning.

B. Allowing the classroom to be disrupted for purposes unrelated to education will have a negative impact on learning.

The actual and potential disturbance of custodial police/CPS interrogations cannot be overlooked. As educators well know, disruptions in the school environment can significantly interfere with student learning.[15] The National Schools Boards Association acknowledges this: It generally "oppose[s] any

---

[14] *Id.* at 41, 43; Norris M. Haynes *et al.*, *It Takes a Whole Village: The SDP School*, in RALLYING THE WHOLE VILLAGE: THE COMER PROCESS FOR REFORMING EDUCATION 42, 50-52 (James P. Comer *et al.*, eds., 1996).

[15] The significance of *avoiding disruption* to student learning has been regularly accepted as a sufficient basis for limiting students' exercise of certain constitutional rights. See, *e.g.*, *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969), and its progeny. It is ironic that Petitioners and their *amici* seek in this case to limit students' constitutional rights to make way for a practice that *increases disruption* to student learning.

disruption of or interference with the school day and environment, especially when it involves removing students from the classroom and learning activities."[16]

Public schools are charged at the state and federal level with educating children in compliance with legislated benchmarks. Numerous pieces of legislation, including compulsory school attendance laws in every state,[17] underscore the importance of students' regular presence in the classroom, where teaching and learning occur. The federal government and state governments are raising educational expectations through legislation such as the No Child Left Behind Act, and increasing, rather than decreasing, the amount of time students spend in the classroom. It cannot be debated that schools must focus on educating children; detours from tailored educational plans for state interests unrelated to education -even for other valuable state interests— have little or no place in the school day absent exigent circumstances.

The case at hand demonstrates the utter lack of necessity for conducting such an intrusive, disruptive investigation at, and during, school. A child with special educational needs was taken out of her classroom with no contemporaneous explanation by school personnel for her removal (other than that

---

[16] Br. for Nat'l Sch. Boards Ass'n *et al.* as *Amici Curiae* in Support of Pet'rs, *Camreta* v. *Greene* and *Alford* v. *Greene*, Nos. 09-1454 and 09-1478 (Dec. 17, 2010), 2010 WL 5168881, at *8.

[17] U.S. Dep't of Educ., National Ctr. for Educ. Statistics, Digest of Educ. Stats., tbl. 166, http://nces.ed.gov/programs/digest/d09/tables/dt09_166.asp (last visited Jan. 25, 2011).

some people wanted to talk with her). There was no emergency, as CPS had waited at least three days before detaining and interrogating S.G.—plenty of time for the CPS worker and/or law enforcement officer to obtain a warrant or a court order to interview the child, and with that, plenty of time to coordinate a more appropriate setting for what should have been a sensitive, careful interview about alleged sexual abuse.

III. Schools Are Far From Ideal Locations For Custodial Police/CPS Interrogations, From The Perspective Of Both The Child And The Investigation

As the National Association of Social Workers explains, it is important that child abuse interviews take place in an environment that is "neutral, private, informal, and free from distractions."[18] Several briefs supporting reversal of the Ninth Circuit's decision assert that schools are appropriate for custodial police/CPS interrogations because they are neutral environments in which children feel safe.[19] At first blush, this seems logical: for most children, schools are places in which they feel safe and unthreatened. In fact, feelings of safety and support may be accentuated for the most vulnerable

---

[18] Br. for Nat'l Ass'n of Social Workers *et al.* as *Amici Curiae* In Support of Pet'rs, *Camreta* v. *Greene* and *Alford* v. *Greene*, Nos. 09-1454 and 09-1478 (Dec. 16, 2010), 2010 WL 5168877, at *30.

[19] *Id.* at *30-32; Br. of the Cook County Public Guardian as *Amicus Curiae* in Support of Neither Party and Suggesting Reversal, *Camreta* v. *Greene* and *Alford* v. *Greene*, Nos. 09-1454 and 09-1478 (Dec. 16, 2010), 2010 WL 5168876, at *26-27; Br. for Nat'l Sch. Boards Ass'n *et al.*, *Camreta* and *Alford* (Nos. 09-1454 and 09-1478), 2010 WL 5168881, at *9.

children. For children who are homeless, transient, or hungry, school is generally a stable place where they can get a hot meal, learn without fear, and seek help from supportive teachers and adults.

Even so, there are certain aspects of school, as experienced by a child, that counsel against using the schoolhouse as an outpost for custodial police/CPS interrogations. First, students can experience shame and embarrassment if they are interrogated at school, which in turn can negatively impact their education. Second, the nature of the school environment as a place in which students are not entirely free to move about at will, combined with the presence of law enforcement in a closed room, can add to feelings of confinement during a custodial police/CPS interrogation, leading students to feel trapped while being questioned about potentially traumatizing events. And third, the natural hierarchy of authority in the school environment—where students are generally submissive to teachers and authority figures—will be accentuated by custodial police/CPS investigations on school grounds, which can lead to greater suggestibility in children being interviewed.

A. Custodial police/CPS interrogations at school can embarrass and traumatize children, ruining their experience of school as a safe space.

The experience of being pulled out of the classroom in front of peers, by an authority figure, is embarrassing for any young child. As anyone who has ever attended public school knows, this signals both to the student being pulled out and to the class that something is wrong: the student misbehaved,

the student has a problem, the student's parents have a problem, and so on. Experiences causing a student shame and embarrassment can interfere with learning:

> For students to place a priority on learning, they must feel safe from both physical danger and embarrassment. Fear of physical harm and fear of embarrassment often have the same effect. Students should not have to worry that a lack of skills or knowledge *or an embarrassing fact about their private lives might be exposed*.[20]

Being pulled out of class and then undergoing traumatic questioning at school about possible sexual abuse would likely embarrass a child of any age. Unclear about the role of the police officer or CPS worker conducting the investigation on school grounds, a child could easily conclude that the nature of the interview—questions about sexual abuse—and any private information she shared, would be conveyed to teachers, and potentially to other students. The interrogated student may also worry about answering questions from peers: "What was that police officer talking to you about for so long?" A uniformed police officer appearing in a classroom to get a student for questioning would certainly heighten the potential shame and embarrassment for any student subject to that experience.

With respect to homeless students in particular, the McKinney-Vento Homeless Assistance Act ("McKinney-Vento Act") recognizes the vulnerability

---

[20] Spence Rogers & Lisa Renard, *Relationship-Driven Teaching*, 57 EDUC. LEADERSHIP 34, 35-36 (Sept. 1999) (emphasis added).

of these children and specifically requires that homeless students be protected from becoming "stigmatized." 42 U.S.C.A. § 11432(e)(3)(C)(i)(III)(dd) and (g)(1)(J)(i) (West 2010). The McKinney-Vento Act urges that any practices which "may act as a barrier to the enrollment, attendance or success in school of homeless children and youths" be changed. *Id.* § 11431(2). Embarrassing and emotionally upsetting custodial police/CPS interrogations are precisely such practices.

Although schools may be *physically* "safe" places for custodial police/CPS interrogations, the experience of being questioned about sexual abuse by strangers changes that safe space into an *emotionally* unsafe space. S.G.'s school-based interrogation left her so traumatized that she was physically ill that evening. Br. for Resp'ts at 4, *Camreta* and *Alford* (Nos. 09-1454 and 09-1478). And not only did S.G. suffer the initial embarrassment and trauma of the interrogation, but going forward she will have the distinct memory of being removed from her classroom for a traumatizing event, being left with a law enforcement officer and another adult stranger in a private office, being questioned about sensitive topics (whether true or not), and feeling that she had to answer "yes" to questions she was repeatedly asked. S.G.'s fear, shame, and embarrassment stemming from that event are now linked to her school experience.

B. Children may feel trapped in school-based, custodial police/CPS interrogations.

To some extent, schools are confined environments that students are not free to leave of their own accord, even though they experience some freedom of

movement during recess, lunchtime, or with permission of teachers. Confinement to the classroom, the school building, or the schoolyard makes sense when imposed to facilitate positive learning activities and social experiences that enhance children's education. But confinement at school for purposes unrelated to education can be confusing for children, or worse, as in S.G.'s case, emotionally disturbing and traumatizing.

Courts recognize the confines of the school environment. "[U]nemancipated minors lack some of the most fundamental rights of self-determination—including even * * * the right to come and go at will." *Vernonia Sch. Dist. 47J* v. *Acton*, 515 U.S. 646, 654 (1995); see also *Couture* v. *Bd. of Educ. of Albuquerque Pub. Sch.*, 535 F.3d 1243, 1250-1251 (10th Cir. 2008) ("We must think about seizures differently in the school context, as students are generally not at liberty to leave the school building when they wish."); *Wallace by Wallace* v. *Batavia Sch. Dist. 101*, 68 F.3d 1010, 1013 (7th Cir. 1995) ("Once under the control of the school, students' movement and location are subject to the ordering and direction of teachers and administrators."); Br. for Pet'r Camreta at 31, *Camreta* (No. 09-1454).

The fact that children are somewhat confined at school increases the chance that they will believe they are not free to leave a school-based custodial police/CPS interrogation, no matter how much pressure they are facing, how uncomfortable they feel, or how traumatizing the experience. Indeed, this was the very harm suffered by S.G. when she was brought to the conference room near the principal's office. S.G. did not think she was allowed to leave the

interrogation room without permission, and she was "too scared to ask [Camreta] any questions." Br. for Resp'ts at 2, *Camreta* and *Alford* (Nos. 09-1454 and 09-1478). She was worried that she would not be allowed to leave even to catch the school bus home at the end of the day, which prompted her to begin lying to the CPS worker in hopes that she would gain her freedom from the interrogation. *Id.* at 3-4.

Had S.G. been "confined" in the traditional way in a classroom at school, she would have felt free to ask to use the bathroom, get a glass of water, or otherwise move about with permission from her teacher. She would have had no fear whatsoever that her teacher would cause her to miss her school bus home. But unclear about the role of the strangers in the interrogation room—one of whom had a visible firearm—S.G.'s sense of confinement was heightened in a traumatizing way and ultimately led her to lie. This, in turn, compromised the integrity of the investigation—harming every party involved. The inherent confines of public school combined with the presence of law enforcement and CPS left S.G. feeling trapped—just one emotional aspect of the trauma she experienced.

C. Children are more suggestible in the school environment.

Students and teachers usually share a "commonality of interests," *T.L.O.*, 469 U.S. at 350 (Powell, J., concurring), and develop a level of trust and understanding with one another. At the same time, students operate within a natural hierarchy of authority at school, recognizing from a very young age that teachers and school administrators are to be obeyed, lest they face disapproval or discipline.

Teachers aim to instill in students a desire to please, in hopes that their encouragement and support will motivate students toward educational success and advancement. When custodial police/CPS interrogations happen in the school context, children may feel additional pressure to please or comply with police officers and other adult figures, either because they desire the type of positive affirmation teachers provide, or because they fear discipline or disapproval for failure to meet perceived expectations. This heightened "suggestibility" can compromise the accuracy of children's statements.

In general, children tend to exhibit conformity to authority figures. "Adolescents are more likely than young adults to make choices that reflect a propensity to comply with authority figures" when being interrogated by the police.[21] This propensity is likely heightened in the school environment. Children's tendency to comply with authority figures, especially in the school setting, makes them more susceptible to answering questions the way they perceive the adult questioner desires them to answer, instead of answering truthfully. On account of their age, and the attendant intellectual and emotional immaturity, children are more impressionable than adults and thus more susceptible to persuasion by

---

[21] Thomas Grisso *et al.*, *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 L. HUM. BEHAV. 333, 357 (Aug. 2003); see also II LAWRENCE KOHLBERG, ESSAYS ON MORAL DEVELOPMENT: THE PSYCHOLOGY OF MORAL DEVELOPMENT 172-173 (1st ed. 1984).

authority figures.[22] This danger is greater for younger children.[23]

Children as young as three years old are involved in the public education system. The IDEA requires that states provide early intervention services to infants and toddlers with disabilities. 34 C.F.R. § 303.12 (2010). And Head Start, a national program, provides grants to private and public organizations, including public schools, for educational and developmental services to children from economically disadvantaged families.[24] In Chicago, for example, Head Start services are provided, in part, by public schools.[25] Preschoolers in particular are deferential to adults' beliefs and are "more likely than older children and adults to confuse what they have been told with what they have experienced."[26] Nothing in the Petitioners' briefs suggests a low-end age limit that police and CPS investigators would not cross if given the freedom by this Court to conduct

---

[22] G. Richardson *et al.*, *Interrogative Suggestibility in an Adolescent Forensic Population*, 18 J. ADOLESCENCE 211, 215 (1995).

[23] BOHANNAN *ET AL.*, OREGON DEP'T OF JUSTICE, OREGON INTERVIEWING GUIDELINES 148 (2004), http://www.doj.state.or.us/crimev/pdf/orinterviewingguide.pdf.

[24] U.S. Dep't of Health & Human Servs., About Head Start, http://eclkc.ohs.acf.hhs.gov/hslc/About%20Head%20Start (last visited Jan. 25, 2011).

[25] Chicago Public Schools, Head Start Child Development Program, http://www.cps.edu/Schools/Preschools/Pages/Headstartchilddevelopmentprogram.aspx (last visited Jan. 25, 2011).

[26] Erna Olafson, *Children's Memory and Suggestibility*, in INTERVIEWING CHILDREN ABOUT SEXUAL ABUSE 10, 20 (Kathleen Coulborn Faller, 2007).

warrantless, non-exigent custodial CPS interrogations without parental consent.

Further, studies have shown that when children are intimidated, they are more suggestible.[27] "Intimidating" describes S.G.'s experience exactly. And S.G.'s experience provides a paradigmatic example of a child's suggestibility in the face of authority figures exercising control over a young child on school grounds: she lied and said what she thought the CPS worker wanted to hear. Br. for Resp'ts at 4, *Camreta* and *Alford* (Nos. 09-1454 and 09-1478).

IV. Parents Have No Expectation That Their Children Will Be Subject To Warrantless, Custodial Police/CPS Interrogations At School Without Their Consent

Parents have a deeply rooted, constitutionally protected interest in the "care, custody, and control" of their children. *Troxel* v. *Granville*, 530 U.S. 57, 65 (2000). That right extends to the decision whether to educate their children within, or outside, the public school system. *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923); *Pierce* v. *Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 534 (1925).

When parents send their children to public school, they accept that during school hours the school will exercise a significant degree of supervision and control over their children *for the purposes of education*. Contrary to Petitioner Camreta's contention, however, it does not follow that when parents send their children to public school, they

---

[27] *Id.* at 27.

surrender them to the authority of the government for any and every governmental interest, no matter how tangentially related (or entirely unrelated) to their children's education. See Br. for Pet'r Camreta at 33, *Camreta* (No. 09-1454) (stating that, because school teachers are mandatory reporters, parents "know that * * * those charged with investigating reports of child abuse will come to the school to interview the child"). Nor would parents expect such an expansive surrender of their rights to the care, custody, and control of their children, in light of the rights parents do retain, under federal and state law, in respect to what happens to their children at school. The mere fact that parents know about teachers' obligations to report abuse to outside authorities *in no way* gives rise to the expectation that these outside authorities will then conduct an investigation inside the school.

Although parents may not have the right to dictate detailed aspects of the education their children receive in public school, the reality is that states grant parents expansive oversight and control over their children's education and require that schools actively engage parents. Ohio law, for example, tasks local school boards with developing policies that "build consistent and effective communication between the parents and foster caregivers of students enrolled in the district and the teachers and administrators assigned to the schools their children or foster children attend," giving parents the opportunity to be "actively involved" in their children's education, and stressing the "importance of the involvement of parents and foster caregivers in directly affecting the success of their children's or foster children's educational efforts."

OHIO REV. CODE ANN. § 3313.472 (West 2010). Some states, including Oregon, require that schools allow parents "an opportunity to examine the instructional materials to be used in any class, course, assembly or school-sponsored activity." OR. REV. STAT. ANN. § 336.465(1)(a) (West 2010).

Federal statutes likewise grant parents the right to oversee and/or control aspects of their children's education. The IDEA, for instance, requires that schools notify parents of children with disabilities of changes in the children's individualized educational programs. 20 U.S.C.A. § 1415(b) (West 2010). It also prevents the sharing of information without parental notification, see *id.* § 1414, which means that *any* questioning of a child with special needs should only occur after parental notice and an opportunity to consent, so that the child's special needs are accommodated in the interview itself. This requirement makes sense: an interview or interrogation of a child with special needs is potentially more damaging (both emotionally and physically) than it might be for a child without special needs.

Other state and federal laws provide parents with a similar prerogative over what happens with their children during the school day. The Protection of Pupil Rights Amendment prevents students from being forced to participate, absent parental consent, in a survey or other type of analysis that deals with a wide range of topics, including political affiliations, sexual behavior, and religious practices. 20 U.S.C.A. § 1232h (West 2010). The McKinney-Vento Act accords parents the right to choose school placement for homeless students who no longer can establish

school residency, 42 U.S.C.A. § 11432(g)(3)(B), and the right to challenge local educational agency decisions, *id.* § 11432(g)(3)(E). And the ESEA requires that schools receiving funds under Title I—the largest federal education program—develop the detailed elements of their required plan for improving education jointly with the parents of the school, in a manner spelled out in the school's parent involvement policy, which in turn (i) must be jointly developed with and approved by the schools' parents, and (ii) must delineate how the school will carry out detailed requirements for ensuring that parents receive sufficient information, training, and assistance to participate. 20 U.S.C.A. § 6318 (West 2010).

Parents also have a right under federal law to protect the privacy of their children's educational information. The Family Educational Rights and Privacy Act ("FERPA") requires schools to give parents access to their children's educational records and affords great privacy protections to parents and students. 20 U.S.C.A. § 1232g (West 2010), amended by Pub. L. 111-296, 124 Stat. 3183 (2010). With limited exceptions, FERPA protects children's educational records from being disclosed to third parties without parental consent. *Id.* § 1232g(b)(1).

Legislated parental rights extend past mere notification. For many school programs and activities, parents must proactively approve their children's participation, or alternatively, they have the right to remove their children from the activity. For example, states may require written parental or guardian consent prior to allowing a child to participate in clubs at the school. *E.g.*, UTAH CODE

ANN. § 53A-11-1210 (West 2010). California law allows parents to withhold consent for their children to be given a physical examination in school. CAL. EDUC. CODE § 49451 (West 2010). And it is nearly universal that parents must provide permission for their children to leave school grounds for field trips.

Another area of widespread recognition of parental oversight is what children learn about human sexuality. In many states and school districts, parents and guardians have the affirmative right to remove their children from courses on human sexuality. Other states require that parents be notified in advance before implementing human sexuality curricula. See, *e.g.*, *Parker* v. *Hurley*, 514 F.3d 87, 91 (1st Cir. 2008). For example, Oregon school districts must "[i]nform parents or guardians *in advance* of any instruction on human sexuality or human immunodeficiency virus and give them an opportunity to review materials" and remove their children from class. OR. REV. STAT. ANN. § 336.465(1)(b) (West 2010) (emphasis added). See also, *e.g.*, CAL. EDUC. CODE § 51938 (West 2010); MICH. COMP. LAWS ANN. § 380.1507(3) (West 2010); TEX. EDUC. CODE ANN. § 28.004(i) (Vernon 2009); David Rigsby, *Sex Education in Schools*, 7 GEO. J. GENDER & L. 895, 897-898 (2006). A handful of states require that a parent must provide written consent before his or her child may be given any instruction relating to human sexuality. See ARIZ. REV. STAT. ANN. § 15-102 (2010);[28] NEV. REV. STAT. § 389.065(4) (West 2010); UTAH ADMIN. CODE § R277-474-1(H) (2010).

---

[28] Note that Arizona's law allows parents to withdraw their children from "any learning material or activity" they find objectionable. ARIZ. REV. STAT. ANN. § 15-102(A)(3).

In short, both federal and state statutes as well as the rules and practices of local school districts—recognize that schools should inform parents of what is happening to their children while at school and obtain parental consent for aspects of their children's education that may cause concern to parents. This makes sense: parents have an overwhelming interest in ensuring the safety and well-being of their children—as they perceive it—whether their children are at home or at school. The Ninth Circuit recognized that "parents have an exceedingly strong interest in directing the upbringing of their children, as well as in protecting both themselves and their children from the embarrassment and social stigmatization attached to child abuse investigations." *Greene*, 588 F.3d at 1015-1016. This interest does not evaporate when children walk through the doors of a public school.

Contrary to Petitioner Camreta's assertion, parents would not naturally understand that "those charged with investigating reports of child abuse will come to the school to interview the child" without parental consent, probable cause, or a warrant. Br. for Pet'r Camreta at 33, *Camreta* (No. 09-1454). Rather, parents would conclude that such an important, potentially traumatizing occurrence would *require* their consent, especially when their consent is required or sought for their children's field trips, extracurricular activities, physical examinations, sex education, and other significant school based events.

V. Relaxing Constitutional Requirements For Police And CPS Agencies In Public Schools Will Give Them Incentives To Bypass Fourth Amendment Requirements

Child welfare agencies are overburdened, underfunded, and poorly staffed.[29] "On a nationwide level there is general agreement that the CPS system is performing poorly."[30] In light of the scarce resources and overworked staff in these important agencies, it is easy to conceive of CPS workers (along with police) using public school resources—such as classrooms, offices, and even educators themselves—to ease some of their budgetary burden.

The incentive to conduct investigations at school is even greater, however, if doing so would eliminate the time, expense, and burden associated with obtaining a warrant—and the practical difficulty of having to give advance warning to the parents who are the very target of the investigation. As a matter of common sense, if Petitioners were to prevail, an important and necessary step in the typical investigation process—convincing a court of probable cause in order to secure a court order to investigate—would regularly be circumvented. Indeed, there is evidence that this practice exists already: one CPS official said in an interview that CPS rarely goes to children's homes for this reason.[31]

---

[29] Sarah H. Ramsey, *Children in Poverty: Reconciling Children's Interests with Child Protective and Welfare Policies*, 61 MD. L. REV. 437, 444 (2002).

[30] *Ibid.*

[31] Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the*

The National Association of Social Workers' *amicus* brief exposes how school-based custodial police/CPS interrogations provide an easy route to avoid traditional constitutional requirements (i.e., protections for those subject to interviews or investigations). "[A]n in-school interview allows social workers to evaluate the child promptly while *avoiding the constitutional problems* inherent in obtaining access to the family home."[32] Those constitutional "problems" may look like "procedural hurdles" to the National Association of Social Workers, but from the perspective of the individuals and families involved, they are critical protections guaranteed by the U.S. Constitution. "[A]lthough the crime of child sexual abuse 'may be heinous * * * [this] does not provide cause for the state to ignore the rights of the accused or any other parties.'" *Greene*, 588 F.3d at 1017 (quoting *Wallis* v. *Spencer*, 202 F.3d 1126, 1130 (9th Cir. 2000)).

If law enforcement and CPS workers can conduct investigations on school grounds without completing the requisite procedural steps and obtaining court approval based on probable cause, they will naturally prefer school-based investigations over community-based investigations for a variety of obvious reasons. Should this practice be sanctioned by this Court, custodial police/CPS interrogations at school will become the rule instead of the exception, further increasing burdens on schools and further chipping

---

Fourth Amendment, 47 WM. & MARY L. REV. 413, 438 and n.58 (2005-06).

[32] Br. for Nat'l Ass'n of Social Workers *et al.*, *Camreta* and *Alford* (Nos. 09-1454 and 09-1478), 2010 WL 5168877, at *31 (emphasis added).

away at the constitutional rights of children and their parents.

CONCLUSION

The government does not have, as a matter of right, unfettered access to a child just because the child enters a public school building. At the same time, the protections afforded parents in the Constitution in directing the upbringing of their children and protecting their children from harmful and traumatizing events do not vanish when children set foot in school. For all these reasons, and for the reasons articulated by Respondents, the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted.

GENE C. SCHAERR
Winston & Strawn LLP
1700 K Street, NW
Washington, DC 20006
(202) 282-5000

LINDA T. COBERLY
Counsel of Record
LINDSEY M. MARCUS
W. KYLE WALTHER
KATE ZELL
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601
(312) 558-5600
LCoberly@winston.com

JANUARY 2011

13

Nos. 09-1454 and 09-1478

Supreme Court, U.S.
FILED
DEC 17 2010
OFFICE OF THE CLERK

In the Supreme Court of the United States

BOB CAMRETA,
Petitioner,
v.
SARAH GREENE, PERSONALLY AND AS NEXT FRIEND FOR S.G., A MINOR, AND K.G., A MINOR,
Respondent.

JAMES ALFORD,
Petitioner,
v.
SARAH GREENE, PERSONALLY AND AS NEXT FRIEND FOR S.G., A MINOR, AND K.G., A MINOR,
Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF PETITIONERS

Anthony S. Barkow
CENTER ON THE ADMINISTRATION OF CRIMINAL LAW
139 MacDougal Street, 3rd Floor
New York, New York 10012
(212) 998-6612

Michael Y. Scudder, Jr.
Counsel of Record
Thoufiq Kutty
Emma Glazer
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
155 North Wacker Drive
Chicago, Illinois 60606
(312) 407-0700

COUNSEL FOR AMICUS CURIAE
CENTER ON THE ADMINISTRATION OF CRIMINAL LAW

456f
(21)

TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

BACKGROUND 2

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE CENTER AGREES WITH PETITIONERS THAT THE NINTH CIRCUIT'S FOURTH AMENDMENT HOLDING SHOULD BE REVERSED 4

II. THE COURT SHOULD DECIDE THIS CASE ON THE BASIS OF A BROAD, CATEGORICAL RULE APPLICABLE TO IN-SCHOOL INTERVIEWS OF POTENTIAL VICTIMS OF ABUSE 4

A. The Proposed Rule Strikes an Appropriate Constitutional Balance 6

B. The Circumstances Here Warrant the Announcement of a Broad, Categorical Rule to Guide Public School and Law Enforcement Personnel 13

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

Atwater v. City of Lago Vista,
532 U.S. 318 (2001) 5

Bd. of Educ. v. Earls,
536 U.S. 822 (2002) 11

Gates v. Texas Dep't of Protective & Regulatory Servs., 537 F.3d 404 (5th Cir. 2008) 11

Greene v. Camreta,
588 F.3d 1011 (9th Cir. 2009) ..... *passim*

I.N.S. v. Delgado,
466 U.S. 210 (1984) 12

Illinois v. Lidster,
540 U.S. 419 (2004) 4, 7, 9, 12

Kennedy v. Louisiana,
128 S.Ct. 2641 (2008) 7

Martinez-Fuerte v. U.S.,
428 U.S. 543 (1976) 8

Maryland v. Buie,
494 U.S. 325 (1990) 14

Michigan Dep't of State Police v. Sitz,
496 U.S. 444 (1990) 8

New Jersey v. T.L.O.,
469 U.S. 325 (1985) 3, 6, 11

New York v. Belton,
453 U.S. 454 (1981) 5, 15

(continued)

New York v. Ferber,
458 U.S. 747 (1982) 6

Pennsylvania v. Mimms,
434 U.S. 106 (1977) 14

Pennsylvania v. Ritchie,
480 U.S. 39 (1987) 8

Skinner v. Ry. Labor Executives' Ass'n,
489 U.S. 602 (1989) 11

Terry v. Ohio,
392 U.S. 1 (1968) 12, 14

U.S. v. Robinson,
414 U.S. 218 (1973) 14, 15

Vernonia School Dist. v. Acton,
515 U.S. 646 (1995) 6, 10, 11

Wyman v. James,
400 U.S. 309 (1971) 6, 9

STATUTES

42 U.S.C. § 1983 2

SUPREME COURT RULES

Supreme Court Rule 37.6 1

INTEREST OF *AMICUS CURIAE* [1]

The Center on the Administration of Criminal Law is dedicated to defining good government practices in criminal matters through academic research, litigation, and participation in the formulation of public policy. The Center regularly comments on issues of broad importance to the administration of the criminal justice system.

The Center files this *amicus* brief in support of the State of Oregon and urges the Court to announce a rule of clear and broad application for public school personnel and other state officials responsible for preventing or investigating child abuse. The Ninth Circuit's decision not only improperly applied fundamental Fourth Amendment principles, but also erected overly-burdensome, highly fact-dependent requirements that public employees must satisfy to protect children suspected of being abused.

Accordingly, the question presented is one of significant practical import in the daily enforcement and administration of criminal law by state actors. The Center has a strong interest in such matters and files this *amicus* brief to aid the Court in its review of the Ninth Circuit's decision.

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The Court's docket confirms that counsel for the parties have executed blanket consents to the filing of *amicus* briefs.

BACKGROUND

In February 2003, police arrested Nimrod Greene for allegedly sexually abusing a seven-year old boy. The boy's parents provided information to officers suggesting that Nimrod also molested his own two children, S.G. and K.G. The Oregon Department of Human Services was informed of these allegations after Nimrod's arrest. Upon learning that Nimrod had been released from prison, Bob Camreta, the social worker assigned to the case, interviewed nine-year-old S.G. at school and thus outside of the influence of her father. Deputy Sheriff James Alford accompanied Camreta, and the interview took place in a private office at the school. Alford wore a police uniform and had a visible firearm, but asked S.G. no questions. *See Greene v. Camreta*, 588 F.3d 1011, 1016-18, 1027-28 (9th Cir. 2009).

Camreta's and Alford's interview of S.G. forms a basis for the lawsuit brought under 42 U.S.C. § 1983 by Sarah Greene, the mother of S.G. and K.G. Among other things, Greene asserted that Camreta's and Alford's joint interview of S.G., without a warrant, parental consent, probable cause, or exigent circumstances, violated the Fourth Amendment.

The Ninth Circuit affirmed the grant of summary judgment to the state-actor defendants on qualified immunity grounds. Stating that it sought "to provide guidance to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment," *Greene*, 588 F.3d at 1022, however, the Ninth Circuit reviewed and reversed the district court's finding that the interview did not violate the Fourth Amendment. Specifically, the Ninth Circuit determined that the balancing test

employed in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), was inapplicable given that Camreta and Alford were not "school officials," and because the specific governmental interest at issue in *T.L.O.* (maintaining discipline in classrooms) was not present here. *Id.* at 1024-25. The Ninth Circuit further concluded that the "special needs" doctrine did not apply because of the degree of law enforcement "entanglement" with the interview of S.G. *Id.* at 1025-30. Instead, the Ninth Circuit applied "the general law of search warrants" and held that the warrantless interview of S.G. violated the Fourth Amendment. *Id.* at 1030.

SUMMARY OF ARGUMENT

The Center agrees with the State of Oregon that the Ninth Circuit erred by applying traditional Fourth Amendment principles and instead should have held that the interview here did not constitute a Fourth Amendment violation.

The Center urges the Court to go further, however, and announce a broad, categorical rule that public school and state child services officials do not violate a minor school child's Fourth Amendment rights by conducting an interview of the child predicated on reasonable objective indicia of abuse, even where the interview includes passive participation by law enforcement.

The proposed rule strikes the proper constitutional balance under the Court's precedents and accounts not only for the well-defined circumstances subject to the rule, but also for the need for clear and workable guidance for public school and other state officials. In practice, the rule would operate to protect children and their Fourth Amendment rights.

ARGUMENT

I. THE CENTER AGREES WITH PETITIONERS THAT THE NINTH CIRCUIT'S FOURTH AMENDMENT HOLDING SHOULD BE REVERSED

The State of Oregon is correct that the Ninth Circuit erred by giving controlling weight to the presence of a law enforcement officer during the interview of S.G. *See Greene*, 588 F.3d at 1027-28.

The Ninth Circuit's approach failed to recognize not only that S.G. was a potential victim and not a criminal suspect, *see Illinois v. Lidster*, 540 U.S. 419, 424 (2004), but also that Deputy Sheriff Alford did no more than accompany social worker Camreta to the interview. In short, given the State's paramount interest in protecting children, and the minimal intrusiveness of the in-school interview, the Ninth Circuit was wrong in the first instance to find a Fourth Amendment violation on the evidence before the District Court.

As explained below, however, the imperative of clear direction for public school and other state officials shouldering responsibility for responding to suspicions of child abuse strongly counsels in favor of the Court deciding this case on broader, categorical grounds.

II. THE COURT SHOULD DECIDE THIS CASE ON THE BASIS OF A BROAD, CATEGORICAL RULE APPLICABLE TO IN-SCHOOL INTERVIEWS OF POTENTIAL VICTIMS OF ABUSE

Reversing the Ninth Circuit's decision in a narrow opinion tethered to the facts and circumstances accompanying the interview of S.G. will do little to guide public school principals, teachers, and

counselors faced with indications of potential child abuse. Interviews of school children will hinge on assessments of factual similarities and differences between this case and the next, requiring public school personnel to navigate a "highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions" that "may be 'literally impossible of application by the officer in the field.'" *New York v. Belton*, 453 U.S. 454, 458 (1981) (citation omitted). The investigation of potential child abuse is an area in which state actors have "an essential interest in readily administrable rules." *Atwater v. City of Lago Vista*, 532 U.S. 318, 347 (2001).

The better approach is to decide the case on the basis of a categorical rule of general applicability to in-school interviews of child victims. This approach is available because the issue presented lends itself to a rule that, when applied in the school setting across a broad class of cases, will sufficiently protect a child's Fourth Amendment interests, while also strongly advancing the State's interest in protecting that same child by investigating indications of possible abuse.

Accordingly, the Center urges the Court to hold that public school and state child services officials do not violate a minor school child's Fourth Amendment rights by conducting an interview of the child predicated on reasonable objective indicia of abuse, even where the interview includes passive participation by law enforcement.

A. The Proposed Rule Strikes an Appropriate Constitutional Balance

1. The Proposed Rule Gives Effect to the Government's Strong Interest in Protecting Children

The beginning point is the government's extraordinarily strong interest in the health and welfare of children, including children entrusted to the state's care and development in public schools. This Court has underscored the weight of this interest on prior occasions. *See, e.g., New York v. Ferber*, 458 U.S. 747, 756-57 (1982) ("It is evident beyond the need for elaboration that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is compelling.") (citation omitted); *Wyman v. James*, 400 U.S. 309, 318 (1971) (stating that "[t]here is no more worthy object of the public's concern" than protecting the interests of dependent children); *see also Vernonia School Dist. v. Acton*, 515 U.S. 646, 656 (1995) (emphasizing "schools' custodial and tutelary responsibility for children").

Indeed, the sheer strength of the government's interest in protecting children has led this Court to reject other Fourth Amendment challenges to state action in the school setting. For example, in *T.L.O.*, the Court identified the "interest of teachers and administrators in maintaining discipline in the classroom and on school grounds" as part of its rationale in upholding the search of a student's purse. 469 U.S. at 339. Similarly, in *Vernonia*, the Court rejected a Fourth Amendment challenge to suspicionless drug testing of students given the governmental interest in "[d]eterring drug use by our Nation's schoolchildren." 515 U.S. at 661.

The government's interest here in protecting children by investigating indications of potential abuse is markedly stronger than the interests implicated in *T.L.O.* and *Vernonia*. While maintaining discipline and averting potential drug use by student athletes are of undeniable importance, they pale in comparison to the government's interest in detecting and preventing abuse—here, potential sexual abuse of nine-year-old S.G. by her father, who had already been arrested for sexually abusing a seven-year-old boy.

2. The Proposed Rule Will Directly Advance the Government's Interest in Protecting Children

In assessing the proposed rule, the inquiry next turns to the degree to which the class of seizures at issue advances the identified governmental interest in protecting children. *Cf. Lidster*, 540 U.S. at 427 (employing same analytical approach).

From an empirical standpoint, investigations of potential child abuse result approximately 25% of the time in confirmation that abuse in fact has occurred. *See Greene*, 588 F.3d at 1015-16 (stating that of the 3.2 million investigations of child abuse conducted by state and local agencies in 2007, fully one quarter, or approximately 800,000, concluded that the children were indeed victims of abuse). This success, however, often depends entirely upon the government's ability to obtain information directly from victimized children, as other direct evidence of abuse seldom exists. *Cf. Kennedy v. Louisiana*, 128 S.Ct. 2641, 2663-64 (2008) ("Underreporting is a common problem with respect to child sexual abuse [because] one of the most commonly cited reasons for nondis-

closure is fear of negative consequences for the perpetrator, a concern that has special force where the abuser is a family member."); *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) (stressing that "[c]hild abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim," whose feelings of "unwillingness to come forward are particularly acute when the abuser is a parent.").

The Center's proposed rule would allow public school personnel, with passive participation by law enforcement, to obtain information about potential abuse from often the only individual capable of providing that information—the abused child. The rule, therefore, would directly advance the government's interest in detecting abuse and protecting children.

The nexus between the proposed rule and the government's interest is much tighter than ones this Court has determined sufficient in prior cases. For example, in *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990), the Court rejected a Fourth Amendment challenge to a highway sobriety checkpoint program that operated with a 1.6% success rate. *Id.* at 455. Similarly, in *Martinez-Fuerte v. U.S.*, 428 U.S. 543 (1976), the Court upheld a car-stop program designed to detect the presence of illegal aliens even though the program had only a 0.5% success rate. *Id.* at 554.

Here, the proposed rule would not only advance a vital governmental interest, but does so in an effective and efficient manner—by enabling access to a victim-witness, often the sole source of information about abuse. Given the minimal nature of the coun-

tervailing Fourth Amendment concerns, the constitutionality of the proposed rule is clear.

3. The Proposed Rule Reflects the Diminished Fourth Amendment Concerns Implicated Here

The Center's proposed rule, although broadly authorizing in-school interviews of children reasonably suspected of being abused, risks minimal intrusion of the child's privacy interests. This minimal intrusion is constitutionally reasonable given the government interest vindicated through the interview—and especially in light of the child's status as a victim-witness, and not a criminal subject or target. The interviews at issue here are neither accusatory nor adversarial, and thus do not bear any of the attributes implicating Fourth Amendment concerns applicable to law enforcement interaction with suspected criminals.

The Ninth Circuit committed fatal error on this point—altogether failing to recognize that the challenged government action (the interview of S.G.) was with an individual that the state reasonably believed needed its protective intervention and assistance, and therefore was outside the traditional setting of state officials interfacing with a subject or target. *Cf. Wyman*, 400 U.S. at 323 (upholding constitutionality of home visit by caseworker and stating that the caseworker "is not a sleuth, but rather, we trust, is a friend to one in need").

This Court's decision in *Lidster* is particularly instructive on these points. In *Lidster*—a case not cited by the Ninth Circuit—the Court analyzed the constitutionality of a community highway stop of potential witnesses to a hit-and-run accident. *Lidster*,

540 U.S. at 422. The Court rejected a Fourth Amendment challenge, emphasizing the "context" surrounding the government's establishment of the highway stop, most especially its purpose of "seeking information from the public." *Id.* at 424-25. This important "information-seeking" objective led to minimally-intrusive interactions between motorists and law enforcement—in circumstances in which the "concept of individualized suspicion had little role to play." *Id.* at 424. "The police," the Court underscored, "expected the information elicited to help them apprehend, not the vehicle's occupants, but other individuals." *Id.* at 423.

The "context"-based approach that guided the Court's analysis in *Lidster*—namely, the government's non-adversarial efforts to acquire information—similarly informed the Court's reasoning in *Vernonia*. There the Court upheld a school drug-testing program "undertaken for prophylactic and distinctly *non*-punitive purposes." *Vernonia*, 515 U.S. at 658 & n.2 (emphasis in original).

The Court's approach in *Lidster*, which emphasizes "context," applies with greater force where, as here, the information yielded in interviews is used to protect the very individual who provided it:

> [T]he government's interest is primarily in protecting the child, not in restricting the child's freedoms. Therefore, when courts are called upon to balance the child's Fourth Amendment rights with the government's interests, it is important to recognize that the child's interests may align with the government's

> interests if, indeed, the child is at risk of abuse.

Gates v. Texas Dep't of Protective & Regulatory Servs., 537 F.3d 404, 427-28 (5th Cir. 2008).

The Center's proposed rule, unlike the Ninth Circuit's analysis, also gives effect to the contextual fact that the authorized interviews would occur within a school. Location, in other words, is a critical contextual factor because the Court has observed that Fourth Amendment rights "are different in public schools" than in other places. *Vernonia*, 515 U.S. at 656; *see also Bd. of Educ. v. Earls*, 536 U.S. 822, 830 (2002) (explaining that "the public school environment serves as the backdrop for the analysis of the privacy interest at stake"); *Gates*, 537 F.3d at 432 ("seizing a child from a public school is a lesser intrusion into the freedoms the child would otherwise enjoy, as those freedoms have already been limited.").

Finally, the government action challenged here—in-school interviews—also is substantially less intrusive than searches and seizures upheld in prior school-setting cases. For example, in *T.L.O.*, 469 U.S. 325, the Court rejected a Fourth Amendment challenge to the search of a female student's purse conducted by a vice principal who suspected the student had been smoking in the school bathroom. Similarly, the Court has upheld a mandatory drug testing program for student athletes, *see Vernonia*, 515 U.S. 646, even though the law traditionally has afforded drug test samples great privacy protection, *see Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989).

4. The Proposed Rule Contains Important Limitations to Protect the Privacy Interests of Children

The Center's proposed rule would not authorize any and all in-school interviews of children to garner information about potential abuse. To the contrary, the rule contains express limitations designed to ensure that the initiation of interviews and governmental conduct during interviews respect Fourth Amendment boundaries.

First, the rule would require any interview to be predicated on a reasonable and objective indication of abuse. This standard, therefore, prohibits random questioning and instead rests on the familiar footing of *Terry*. *See Terry v. Ohio*, 392 U.S. 1, 27 (1968) (observing that in assessing the reasonableness of an officer's actions "due weight must be given, not to [an officer's] inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience"). Moreover, because it is predicated on the likelihood of abuse, not on any crime, the rule is appropriately and narrowly tailored.

Second, consistent with this Court's prior cases, the Center's proposed rule, contrary to the Ninth Circuit's analysis, would authorize the passive participation by law enforcement in interviews. *Cf. I.N.S. v. Delgado*, 466 U.S. 210, 216 (1984) (explaining that "police questioning, by itself, is unlikely to result in a Fourth Amendment violation"); *see also Lidster*, 540 U.S. at 425 (observing that "the law ordinarily permits police to seek voluntary cooperation of members of the public in the investigation of a

crime" and "citizens will often react positively when police simply ask for help").

This limitation is easily respected where a law enforcement officer functions as a witness to the interview and thus plays only a passive role in questioning the child. Permitting the officer to play an expanded role risks the proposed rule authorizing warrantless in-school interviews conducted solely by police—a circumstance perhaps not amenable to being governed under a broad rule of general application.

To be sure, however, allowing for passive participation of law enforcement is appropriate and, indeed, necessary given the unique and complementary role of law enforcement in ensuring the ongoing welfare of children. Although child services agencies can remove a child from a troubled home, it is the responsibility of law enforcement to render that child's home permanently safe by arresting and prosecuting the abuser. Those states with laws permitting joint social services and law enforcement interaction in child abuse circumstances have recognized the complementary roles played by these two arms of government in ensuring the welfare of children. *See, e.g.*, *Greene*, 588 F.3d at 1028 (discussing Oregon statutory framework governing joint child abuse investigations). The Center's proposed rule respects these policy determinations.

B. The Circumstances Here Warrant the Announcement of a Broad, Categorical Rule to Guide Public School and Law Enforcement Personnel

The Court's choosing to decide this case on the basis of a broad rule applicable to in-school inter-

views of children would adhere closely to the course charted in prior Fourth Amendment cases. In those instances, the Court has answered questions arising out of particular facts by announcing rules of general applicability. The rules, in turn, provide important guidance to state officials likely to encounter recurring factual circumstances within a common category of cases. Prominent examples include:

- *Terry v. Ohio*, 392 U.S. 1 (1968), where the Court announced a broad "stop and frisk" rule applicable to the innumerable circumstances in which police reasonably suspect criminal activity afoot.
- *U.S. v. Robinson*, 414 U.S. 218 (1973), where the Court held that the Fourth Amendment licensed searches incident to arrest.
- *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), where the Court announced the rule authorizing police officers to order the driver out of a vehicle when that vehicle has been lawfully detained.
- *Maryland v. Buie*, 494 U.S. 325 (1990), where the Court held that the Fourth Amendment permits limited protective sweeps of areas within homes in which dangerous individuals may be present.

These decisions have several factors in common—each of which combined to provide the Court sufficient comfort that a broad rule of general application was appropriate. First, the particular disputes arose within a well-defined class of searches or seizures where individual cases recurred with frequency and presented similar individual factual circum-

stances. Second, the Court determined that the issue presented was amenable to the formulation of a broad rule that, when applied across many facts and circumstances within a class of cases, would strike the proper constitutional balance in each individual case. Third, in each case, the circumstances presented counseled in favor of government personnel receiving clear guidance for acting in what often are time-sensitive situations. Fourth, the Court's announcement of a broad rule promoted consistent outcomes in cases within the affected class.

Each of these factors is present here. The Fourth Amendment question at issue arises only in the limited and well-defined setting of public schools and against the backdrop of school officials confronted with time-sensitive needs to respond to reasonable suspicions of child abuse—a frequently occurring circumstance. *Cf. Greene*, 588 F.3d at 1015 (observing that the "number of child abuse allegations is staggering," with, for example, "state and local agencies [having] investigated 3.2 million reports of child abuse or neglect" in 2007 alone).

When reasonable suspicions of abuse present themselves in the school setting, teachers, counselors, and principals, along with the law enforcement community, need clear rules to guide their decision making on how to proceed. *See Belton*, 453 U.S. at 458 (emphasizing that "[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront") (internal quotations omitted) (citation omitted); *Robinson*, 414 U.S. at 235 (applying similar reasoning to justify searches incident to arrest). A clear rule would not only benefit

state actors, but also would enhance judicial efficiency by eliminating the need for fact-specific inquiries and the possibility of conflicting outcomes across individual cases.

In addition, from a constitutional perspective, the issue presented is amenable to being answered with a broad, categorical rule of decision. Across the overwhelming majority of affected cases, the government's interest in protecting children is exceedingly strong, and the corresponding level of intrusion is negligible, thereby minimizing the possibility that the rule will result in a constitutional violation in any specific case.

In the end, then, the Center's proposed rule would provide clear guidance while also holding state officials accountable to the rule's limitations. The rule also strikes the proper balance in another important, reinforcing dimension—it protects the health and welfare of children as well as their Fourth Amendment rights.

CONCLUSION

For these reasons, this Court should reverse the Ninth Circuit's decision on the basis of the rule advanced by the Center.

Dated: December 17, 2010

Respectfully submitted,

Anthony S. Barkow
CENTER ON THE ADMINISTRATION OF CRIMINAL LAW
139 MacDougal Street, 3rd Floor
New York, New York 10012
(212) 998-6612

Michael Y. Scudder, Jr.
Counsel of Record
Thoufiq Kutty
Emma Glazer
SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
155 North Wacker Drive
Chicago, Illinois 60606
(312) 407-0700

COUNSEL FOR AMICUS CURIAE
CENTER ON THE ADMINISTRATION OF CRIMINAL LAW

Supreme Court, U.S.
FILED
DEC 17 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondents.

JAMES ALFORD, Deputy Sheriff, Deschutes County, Oregon,

Petitioner,

v.

SARAH GREENE, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE CHILDREN'S ADVOCACY INSTITUTE IN SUPPORT OF NEITHER PARTY

ROBERT C. FELLMETH
Counsel of Record
Price Professor of Public Interest Law
Executive Director,
CHILDREN'S ADVOCACY INSTITUTE
JULIANNE D'ANGELO FELLMETH
Administrative Director/Supervising Attorney, CENTER FOR PUBLIC INTEREST LAW
ELISA WEICHEL
Administrative Director/Staff Attorney,
CHILDREN'S ADVOCACY INSTITUTE
EDWARD HOWARD
Senior Counsel,
CHILDREN'S ADVOCACY INSTITUTE
CHRISTINA RIEHL
Senior Staff Attorney,
CHILDREN'S ADVOCACY INSTITUTE

UNIVERSITY OF SAN DIEGO
SCHOOL OF LAW
5998 Alcalá Park
San Diego, CA 92110
(619) 260-4806
cpil@sandiego.edu

Counsel for Amicus Curiae Children's Advocacy Institute

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

452b (47)

QUESTIONS PRESENTED

In this case, the Court must decide to affirm or alter a Ninth Circuit holding that requires parental consent, or a warrant (or similar court detention probable cause order) under Fourth Amendment standards, before Child Protective Services social workers conduct an in-school interview of a suspected child abuse victim. The holding may apply *a fortiori* well beyond the instant facts, and to interviews for civil/child protection purposes conducted of child witnesses to abuse, and to child interviews in other settings outside of school.

TABLE OF CONTENTS

Page

Questions Presented i

Interest of *Amicus Curiae* 1

Summary of Argument 3

Argument 7

I. This Court's Fourth Amendment Balancing Test Consists of Four Elements: (a) the State Interest in the Intrusion, (b) its Nature and Degree, (c) the Opportunity for a Warrant, and (d) its Particularized Factual Basis 7

II. CPS Investigations Are Complex Civil Inquiries Intended to Protect Children and Are Under the Auspices of Juvenile Courts Providing Substantial Due Process 12

III. The Four-Part Balancing Test Commends Rejection of the Categorical Requirement of Parental Consent or Probable Cause Warrants Prior to CPS Child Interviews 24

(A) State Interest in (or Justification for) the Search 25

(B) Degree of Intrusion 29

(1) Degree of Intrusion: Expectation of Privacy/Nature and Location ... 29

(2) Degree of Intrusion: Nexus 31

(3) Degree of Intrusion: Civil vs. Criminal, Target vs. Protection Facilitation 31

TABLE OF CONTENTS – Continued

Page

(C) Opportunity for a Warrant 33

(D) Factual Basis for the Intrusion 33

Conclusion..... 35

TABLE OF AUTHORITIES

Page

U.S. SUPREME COURT CASES

Almeida-Sanchez v. United States, 413 U.S. 266 (1973) 8

Arizona v. Hicks, 480 U.S. 321 (1987) 8

Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002) 6, 28, 29, 32

Brown v. Texas, 443 U.S. 47 (1979) 36

California v. Greenwood, 486 U.S. 35 (1988) 8

California v. Hodari D., 499 U.S. 621 (1991) 8

Camara v. Municipal Court, 387 U.S. 523 (1967) 8

Colonnade Catering Corp. v. U.S., 397 U.S. 72 (1970) 8

Donovan v. Dewey, 452 U.S. 594 (1981) 8

Illinois v. Gates, 462 U.S. 213 (1983) 23

Illinois v. Lidster, 540 U.S. 419 (2004) 32

Illinois v. McArthur, 531 U.S. 326 (2001) 8

Indianapolis v. Edmond, 531 U.S. 32 (2000) 8

Katz v. United States, 389 U.S. 347 (1967) 10

Lassiter v. Department of Social Services, 452 U.S. 18 (1981) 17

Michigan v. Tyler, 436 U.S. 499 (1978) 8

Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990) 8

TABLE OF AUTHORITIES – Continued

Page

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) 9

New Jersey v. TLO, 469 U.S. 325 (1985) ... 6, 9, 28, 31, 32

North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908) 9

O'Connor v. Ortega, 480 U.S. 709 (1987) 9

Rakas v. Illinois, 439 U.S. 128 (1978) 10

Safford Unified School District #1 v. Redding, 557 U.S.___ (2009) 9, 36

Santosky v. Kramer, 45 U.S. 745 (1982) 18

Schmerber v. California, 384 U.S. 757 (1966) 8

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 9

Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989) 9

Terry v. Ohio, 392 U.S. 1 (1968) 8

U.S. v. Biswell, 406 U.S. 311 (1972) 8

U.S. v. Chadwick, 433 U.S. 1 (1977) 9

U.S. v. Cortez, 449 U.S. 411 (1981) 30

U.S. v. Hensley, 469 U.S. 221 (1985) 8, 30

U.S. v. Knights, 534 U.S. 112 (2001) 9

U.S. v. Martinez-Fuerte, 428 U.S. 543 (1976) 8

U.S. v. Oliver, 466 U.S. 170 (1984) 8

Vernonia School District 47J v. Acton, 515 U.S. 646 (1995) 28, 32

Warden v. Hayden, 387 U.S. 294 (1967) 9, 11

Wyman v. James, 400 U.S. 309 (1971) 31

TABLE OF AUTHORITIES – Continued

Page

OTHER FEDERAL COURT CASES

California Foster Parents Association, et al. v. Wagner, 620 F.3d 1115 (9th Cir. 2010) 1

Doe v. Heck, 327 F.3d 492 (7th Cir. 2003) 30

E.T. v. George, 681 F.Supp.2d 1151 (2010) (U.S. District Court Case No. 2:09-cv-01950 FCD DAD) 1, 28

STATE CASES

State v. Hunt, 406 P.2d 208 (Arizona 1965) 33, 34, 35

FEDERAL CONSTITUTION

U.S. Const. amend. IV .....*passim*

FEDERAL STATUTES

42 U.S.C. § 670 *et seq.* 16

42 U.S.C. § 671(a)(15)(B)(i) 16

42 U.S.C. § 671(a)(15)(B)(ii) 17

42 U.S.C. § 675(5)(B) 17

42 U.S.C. § 5106a(b)(2)(A)(ix) 18

STATE STATUTES

California Welfare and Institutions Code § 315.....16

California Welfare and Institutions Code §§ 355, 358.....17

TABLE OF AUTHORITIES – Continued

Page

California Welfare and Institutions Code §§ 395, 366.26(l) 18

MISCELLANEOUS AUTHORITY

California Department of Social Services, *California Child Fatality and Near Fatality Annual Report CY 2008* (May 2010) available at http://www.childsworld.ca.gov/res/pdf/2008AnnualChildReport.pdf 22

Childhelp.org: National Child Abuse Statistics citing 2007 data and available at http://www.childhelp.org/pages.statistics 21

First Star and Children's Advocacy Institute, *A Child's Right to Counsel, 2nd Edition: A National Report Card on Legal Representation of Abused and Neglected Children* (2009) available at http://www.caichildlaw.org/Misc/Final_RTC_2nd_Edition_lr.pdf 19

Lyon, Thomas D., *Investigative Interviewing of the Child*, CHILD WELFARE LAW AND PRACTICE, Second Edition (2010), Chapter 5 ..... 15, 16

National Association of Counsel for Children, *The Legal System*, available at www.naccchildlaw.org/?page=legalsystem 18

TABLE OF AUTHORITIES – Continued

Page

Cathleen Otero, M.S.W., M.P.A., Sharon Boles, Ph.D., Nancy K. Young, Ph.D., Kim Dennis, M.P.A., *Methamphetamine Addiction, Treatment, and Outcomes: Implications for Child Welfare Workers*, Substance Abuse and Mental Health Services Administration Center for Substance Abuse Treatment, 4-17-2006, available at www.ncsacw.samhsa.gov/files/Meth%20and%20Child%20Safety.pdf 20

Roland Summit, M.D., *The Child Abuse Accommodation Syndrome*, CHILD ABUSE & NEGLECT, Vol. 7 (1983) at 177-193 30

U.S. Department of Health and Human Services, *Child Abuse and Neglect Fatalities: Statistics and Interventions* (April 2010) available at http://www.childwelfare.gov/pubs/factsheets/fatality.pdf 21

U.S. Department of Health and Human Services, *Child Maltreatment 2008*, available at http://www.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf 13, 14, 23

Woodrow Wilson School of Public and International Affairs and the Brookings Institution, *Fragile Families*, FUTURE OF CHILDREN, Volume 20, No. 2 (Fall 2010) available at http://futureofchildren.org/futureofchildren/publications/docs/20_02_FullJournal.pdf 19

INTEREST OF *AMICUS CURIAE*[1]

Based at the University of San Diego School of Law, the Children's Advocacy Institute (CAI) is an academic center devoted to the interests of the nation's children. It monitors California and federal standards affecting children. Since 1993, CAI has offered courses and clinics in child-related law, including the representation of children, the county, and/or parents in juvenile dependency court, and – more recently – representation of children in juvenile delinquency court. Over 500 law graduates have participated in its programs. CAI examines state and federal regulatory and legislative policies pertaining to children, and lobbies in Sacramento and Washington, D.C., on behalf of children. It has sponsored numerous enacted statutes relevant to foster children and Child Protective Services (CPS) in California. It litigates on behalf of allegedly abused children and foster care providers.[2]

2. CAI's founder and director, and co-author of this brief, is Professor Robert Fellmeth. Professor

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. Letters of consent are on file at the Court.

[2] See *California Foster Parents Association, et al. v. Wagner*, 620 F.3d 1115 (9th Cir. 2010); see also *E.T. v. George*, 681 F.Supp.2d 1151 (2010) (Case No. 2:09-cv-01950 FCD DAD), now pending before the Ninth Circuit.

Fellmeth has held the Price Chair in Public Interest Law on the USD School of Law faculty since 1990. His background in the issues surrounding this case include its Fourth Amendment and child abuse investigation elements. His experience as to the former includes nine years as a public prosecutor, search warrant applications and litigation of search standards, six years teaching Fourth Amendment related courses, and co-authorship of the treatise *California White Collar Crime* (with Papageorge, Tower Publishing, 2010) addressing constitutional search standards across various civil state interventions. In the child protection subject area, Professor Fellmeth has taught Child Rights and Remedies for 21 years; has directed a law school clinic representing children in both dependency and delinquency courts; and is the author of the text *Child Rights and Remedies* (Clarity Press 2002, 2006; 3d edition scheduled for 2011). Professor Fellmeth has long been involved in child advocacy and civil liberties-oriented national organizations.[3]

Co-author Christina Riehl is a graduate of the USD School of Law and its CAI program. She has four years of experience at the Children's Law Center

---

[3] He currently chairs the Boards of Public Citizen Foundation in Washington, D.C., and the National Association of Counsel for Children, and serves as Board Counsel for Voices for America's Children (formerly the National Association of Child Advocates), among others. This brief represents only the views of the Children's Advocacy Institute and no other entity or person.

of Los Angeles, the nation's largest agency of attorneys representing abused children in state dependency court. From 2006 to 2009, CAI administered a federal grant for the education of new attorneys practicing in juvenile court in California; attorney Riehl was the primary organizer of that educational program.

CAI offers this *amicus curiae* brief to present the perspective of the children it exclusively represents, particularly those subject to molestation, abuse and neglect. CAI has no financial or other interest relevant to this case.

SUMMARY OF ARGUMENT

Child Protective Services (CPS)[4] interviews of children who may be victims of or witnesses to abuse are part of the state's assumed role as child civil protector. The Fourth Amendment's important limitations on the State *vis-a-vis* individual liberty is here somewhat complicated – for the State here arguably acts not to oppress a citizen, but to preserve the rights of a helpless part of its citizenry from the depredations of privately stronger persons. And in the current context, the State may be the only protector of child rights extant.

[4] CPS is a common name for social workers who operate "hot lines" or receive initial information about abuse and conduct initial investigations, but the nomenclature varies somewhat by state and county.

Moreover, the system in place includes numerous checks to protect the rights of suspected parental abusers, including required "reasonable efforts" not to remove a child; a detention hearing before a neutral court with the burden on the State to show child danger; appointment of counsel for all involved parents; mandated "reasonable efforts" to reunify; jurisdiction hearing; disposition hearing (*pendente lite*); review hearings; and permanent placement hearings – all before the judiciary, and including liberal rights of appellate review. The sole state check in the other direction – on the failure to remove a child subject to continuous beatings, molestation or severe neglect – is the efficacy of the CPS investigation. Period.

The obstacle posited of parental consent to a child interview is complicated by the involvement of a parent in approximately 80% of child abuse cases. And it is further exacerbated by the regrettably common dynamic of "failure to protect" or even complicity in the abuse by the non-offending parent.[5] The alternative obstacle of a probable-cause based warrant or detention order is complicated by both the time and resources required for its acquisition, and the fact that probable cause achievement typically comes *from* the child interview (not before it occurs), which creates a "Catch-22" preclusion to effective CPS inquiry. The fact that about one-half of child

[5] Parental protection is surprisingly trumped by spousal or sexual partner loyalty in many cases.

deaths from abuse or neglect currently occur with prior reports to CPS about that child victim underscores the tragic consequences of the requirements here propounded.

Amicus curiae CAI agrees that CPS interviews should not be cover for criminal investigations, and that children are best interviewed by multidisciplinary experts. But our advocacy for an ideal interview methodology, for a quicker timeline, and for clear delineation from a parallel criminal investigation should not yield the *non sequitur* of Constitution-based rules and limitations with unintended and devastating consequences. If the interview is for *bona fide* child protection purposes, is conducted by the civil servant so dedicated, and would have been justified and would have occurred without the criminal inquiry aspect, it should not be precluded nor measured by criminal investigative standards.[6]

CAI agrees that such interviews of children do involve "state intrusion" and can raise Fourth Amendment limitations on the State. But it is not the "seizure" of a parent's property as if the child were chattel.[7] CAI respectfully argues that the intrusive

---

[6] The instant interview included a peace officer. But it was conducted by the social worker, and it occurred on the first day of school after the release of the parent from jail for relevant criminal charges.

[7] CAI also recognizes that this child did not want to be interviewed. However, "Child Abuse Accommodation Syndrome" is not uncommon, and is understandable given the dependence

(Continued on following page)

searches authorized by *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls,* 536 U.S. 822 (2002), and those now common in airports, at DUI checkpoints, and in numerous other contexts discussed below require no quantum of cause or suspicion whatever. And they often involve searches by peace officers, or with peace officers in the vicinity, and with referrals for criminal prosecution for contraband, *et al.* common and allowed.[8] But CAI respectfully urges that such blank license not be granted here. Rather, a more balanced standard of required "reasonable suspicion" should be imposed, as enunciated by this Court for school searches in *New Jersey v. TLO.*[9] The difference between "probable cause" and "reasonable suspicion" is momentous; the latter allows proper limitations on the State for

---

of children on their parents, and the threats (or perceived threats) of retaliation from disclosure by the child that many children suffer. See discussion below. A gentle examination of a child's account may be necessary to identify contradictions and an accurate picture of current endangerment.

[8] Here, the person detained for two hours and questioned was not the criminal suspect, but the subject of civil protection.

[9] 469 U.S. 325 (1985). Note that the purse search in *TLO* uncovered illegal drugs and there is no judicial bar to school officials referring such offenses to peace officers for criminal arrest and prosecution. The determining variable is not the presence of peace officers or the criminal aspect, but the legitimate primary motivation of civil officials (*e.g.*, school administrators) to search for purposes of school rule compliance.

these intrusions, without the unintended consequences of an overly restrictive probable cause test.[10]

ARGUMENT

I. This Court's Fourth Amendment Balancing Test Consists of Four Elements: (a) the State Interest in the Intrusion, (b) its Nature and Degree, (c) the Opportunity for a Warrant, and (d) its Particularized Factual Basis

CAI urges this Court to explicitly adopt a four-part test for Fourth Amendment review generally. This test reflects a rational incorporation of the scattered "doctrines" and types of searches that have proliferated over the last six decades of court precedents. Instead of a body of law applying to a type of search unrelated to any unifying criteria, all state intrusions might properly be subject to criteria that allow cross-comparison, rational explanation, and enhanced predictability. There is not the temptation to invent a new term of art and body of law for each of the multitude of justifications that may come before the courts.

---

[10] The probable cause standard traditionally involves critical elements of prior demonstrated "source reliability" (*e.g.*, "the source has provided information on three previous occasions, each resulting in affirmation of the information and conviction"). That level of confirmation is not common in child abuse investigations – until involved children are interviewed, see discussion and citations below.

The extensive body of court-delineated law over the Fourth Amendment has involved a patchwork quilt of more than twenty different categories of searches – each enunciated and developed in sometimes idiosyncratic fashion. Examples include detention to obtain a warrant,[11] searches allowed as part of a "stop and frisk,"[12] a seizure based on "plain sight" discovery,[13] the related "open fields" doctrine,[14] "automobile stops,"[15] "evanescent evidence" (that may disappear),[16] arson investigations,[17] an "administrative search,"[18] a "border" search,[19] a "highly regulated industry" search,[20] a search "incident to lawful arrest,"[21]

---

[11] *Illinois v. McArthur*, 531 U.S. 326 (2001).

[12] *Terry v. Ohio*, 392 U.S. 1 (1968); *U.S. v. Hensley*, 469 U.S. 221 (1985).

[13] *Arizona v. Hicks*, 480 U.S. 321 (1987).

[14] *U.S. v. Oliver*, 466 U.S. 170 (1984); *see also* application to trash put out for collection in *California v. Greenwood*, 486 U.S. 35 (1988).

[15] *Indianapolis v. Edmond*, 531 U.S. 32 (2000). Warrantless roadblocks have been upheld for detection and arrest for drunk driving (*see Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990)) or illegal immigration (*U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976)).

[16] *See, e.g., Schmerber v. California*, 384 U.S. 757 (1966) pertaining to a blood sample containing alcohol.

[17] *Michigan v. Tyler*, 436 U.S. 499 (1978).

[18] *Camara v. Municipal Court*, 387 U.S. 523 (1967).

[19] *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973).

[20] *Colonnade Catering Corp. v. U.S.*, 397 U.S. 72 (1970); *U.S. v. Biswell*, 406 U.S. 311 (1972); *Donovan v. Dewey*, 452 U.S. 594 (1981).

[21] *See, e.g., California v. Hodari D.*, 499 U.S. 621 (1991).

"hot pursuit,"[22] explosives,[23] food safety,[24] probationers' homes exception,[25] government employee desk searches,[26] "drug testing" generally,[27] consent,[28] and many others.

There is also the "student school search" category – where searches are allowed based on "reasonable suspicion."[29] In the most recent school search case of *Safford Unified School District #1 v. Redding,* 129 S.Ct. 2633 (2009), this Court made reference to a "balancing test" in rejecting the inspection within bras and panties of an adolescent girl for pills without cause to believe such items were being so concealed. What was and is that "balancing test"? A review of the body of caselaw from this Court suggests the following four elements:

---

[22] *Warden v. Hayden,* 387 U.S. 294 (1967).

[23] *U.S. v. Chadwick,* 433 U.S. 1 (1977).

[24] *North American Cold Storage Co. v. City of Chicago,* 211 U.S. 306 (1908).

[25] *See U.S. v. Knights,* 534 U.S. 112 (2001) permitting the search of a probationer's home on reasonable suspicion of a violation separate and apart from probationary conditions.

[26] *O'Connor v. Ortega,* 480 U.S. 709 (1987), allowing search of the desk of a doctor in a public hospital for work-related misconduct based only on reasonable suspicion.

[27] *Skinner v. Railway Labor Executives' Association,* 489 U.S. 602 (1989); *see also National Treasury Employees Union v. Von Raab,* 489 U.S. 656 (1989) allowing search without warrant or probable cause or even individualized reasonable suspicion.

[28] *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973).

[29] *New Jersey v. TLO, supra* note 9.

(a) What is the state interest in (or justification for) the search? The state's interest in a search or seizure is a necessary factor in weighing its reasonableness. And the nature and extent of the state's interest is a primary determinant in any constitutional balancing – whether it be the "compelling state interest" analyzed in "strict scrutiny," or the "legitimate state interest" weighed in "rational relation" test application. "Reasonableness" implies a reason for an action, and the greater the legitimate need for that action, the more weight properly given to an intrusion, with tolerated intrusion increasing as the state's rationale becomes more compelling.

(b) What is the nature and degree of intrusion? Four subparts make up the second element of "degree of intrusion." First, it depends upon the underlying **"reasonable expectation of privacy"** as commonly articulated by this Court.[30] That expectation varies according to the "zone of privacy" involved and the degree of state intrusion. That variation spectrum extends from the privacy accorded mutually consenting sexual decisions by adults in the bedroom to the reduced privacy expectation of a publicly regulated utility. Second, is the **nature of the intrusion**. Is it a brief stop and conversation? Or does an actual seizure occur? Where does it occur (*e.g.*, within the body, in a home, in a public place)?

---

[30] *Katz v. United States*, 389 U.S. 347 (1967); *see esp. Rakas v. Illinois*, 439 U.S. 128 (1978).

Third, what is the **"nexus"** of the intrusion to the first element of compelling state interest above? Is it overly broad and involve excessive and gratuitous state interference beyond the scope of the state justification? Such an element is similar to the "no less restrictive alternatives" or "required fit" elements in much Constitutional precedent. Finally, do we enhance the degree of intrusion where the state intruder is the armed police (*e.g.*, a peace officer) engaged in a criminal investigation? Is it enhanced, in particular, where it is for the purpose of possible incarceration by armed constables, and where who is searched is determined by relatively unfettered police discretion.

(c) What is the opportunity for a warrant? The constitutional requirement of a warrant incorporates precedent for its traversal if its probable cause basis is flawed. Is the required substantive basis for a warrant properly a precondition for a search given the involved compelling state interest and the degree of intrusion occurring? Does it matter that the intervention occurs while a continuing violation may be occurring? Is there a time constraint parallel to those acknowledged, for example in the "hot pursuit" or "emergency" search and seizure exception doctrines?[31]

(d) What is the factual basis for a particular intrusion? What is the quantum and reliability of information indicating that it may produce what is

---

[31] *See, e.g., Warden v. Hayden*, 387 U.S. 294 (1967).

sought? Does the State have solid probable cause, and merely lacks time to obtain a warrant? Is the basis for the search nothing more than rumor? Are there objective facts producing "reasonable suspicion"? Is the motivation not *bona fide*, but occurring for an improper motivation – retaliation, harassment, discrimination or is otherwise improper? Again, does the factual basis have sufficient connection to both the State interest justifying it (*supra*), and to the scope of a particular search?

Importantly, this fourth element is very much influenced by the state justification for the search and the weight given to it viscerally. Hence, relatively baseless and boundless searches are approved involving airplane flight safety (with millions now subject to body cavity oversight), border searches, highly regulated industries, drug testing, automobile roadblocks and others. The major requirement here is lack of collateral *animus* or impermissible profiling. For other categories and circumstances individualized reasonable suspicion is necessary. For others, consent is needed, and for still other situations, a prior court warrant based on reliable probable cause is required.

II. CPS Investigations Are Complex Civil Inquiries Intended to Protect Children and Are Under the Auspices of Juvenile Courts Providing Substantial Due Process

CAI respectfully contends that the four-part test above is a fair distillation of this Court's numerous

decisions historically applying the Fourth Amendment to state action. To apply it in the instant case requires consideration of the compelling state interest in CPS investigations, the role of child interviews, and the consequences of alternative limitations or prerequisites for such interviews.

The Ninth Circuit opinion refers to the 3.6 million annual reports of child abuse or neglect nationally (using 2006 data; *see* Opinion at 16300). The opinion notes that "only ¼" are confirmed. The implication is that many instances of "state intrusion" are occurring and in only a small percentage does inquiry lead to a level of confirmation warranting such state interference. This notion, and the opinion below in general, do not reflect an accurate understanding of how CPS investigations are conducted, nor (of greater concern) the unintended consequences of its holding as applied. CAI presents an important predicate: A description of how Child Protective Services work, their authority, purposes and circumstances.

Of the cited 3 million-plus reports of child abuse received each year, over one-third are screened out at the point of the phone call.[32] This means that, while someone apparently called to report suspected abuse, no further interviews or other action was undertaken by CPS. Importantly, more than one-half (57.9%) of

---

[32] U.S. Department of Health and Human Services, *Child Maltreatment 2008* at 5 (available at http://www.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf).

the reports come from professionals – such as teachers, attorneys, police officers, social services staff, medical staff, mental health workers, child daycare workers, and foster care providers, most of whom are mandated reporters. That is, under state law they are required to report suspected abuse or neglect in violation of state law. Of the reports that do reach the point of further investigation, that further inquiry finds a child to be the victim of abuse or neglect in 23.7% of the cases.[33] Underscoring the misplaced reliance on "parental consent" as a prior condition for child contact, more than 80% of these cases involve an alleged finding of abuse by one or both of the parents or caretakers of the child.[34]

While the police may be present as a part of the investigatory phase, this is often merely to assure peace throughout the process (and, often, to assure the social worker is adequately protected). In the majority of cases where child abuse or neglect has occurred, there is no subsequent arrest of the perpetrator. This disconnect between child protection and criminal arrest occurs for numerous reasons, including the very different standards of proof for

---

[33] *Id.* at 5.

[34] *Id.* at 28. Regrettably, even where one parent is not involved in the abuse, in a disturbing percentage of the cases the non-offending parent covers for the offending one, or does not believe the allegations of abuse – even where they are substantiated by overwhelming evidence. This "failure to protect" problem and the primacy of spousal allegiance is not rare.

criminal abuse and neglect than for civil abuse and neglect that will give rise to the removal of a child from her home. While criminal culpability requires a finding beyond a reasonable doubt, the standard of proof for the jurisdiction of the juvenile court to protect an abused or neglected child is a "preponderance of the evidence."

The interview which occurred in the present case should be understood in the more typical context. CAI agrees that interviews of child abuse victims are best conducted not as the opinion below describes. Rather, they are best conducted by experts who know how to ask open-ended questions, with expertise, and ideally, on videotape. More and more jurisdictions are turning to Children's Advocacy Centers for the initial interview of children suspected to be the victims of child abuse.[35] There are already 300 such Children's Advocacy Centers across the country with several other jurisdictions using best practice techniques for the interviewing of children. A great deal of work has been done in recent years to establish best practices for interviewing children to improve the quality of the interviews conducted by social workers, police, and therapists.[36]

---

[35] While this type of interviews is certainly a best practice approach, we note that the removal of a child to a Child Advocacy Center would certainly involve a "taking" which is not always the case in field interviews such as the one that occurred here.

[36] Lyon, Thomas D., *Investigative Interviewing of the Child*, CHILD WELFARE LAW AND PRACTICE, Second Edition (2010),

(Continued on following page)

The federal Child Welfare Act (42 U.S.C. § 670 *et seq.*) becomes universally relevant at point of initial report receipt by CPS. This statute guides the allocation of billions of dollars in federal Social Security Act Title IV-B and IV-E funding to the states. It outlines a federal-state cooperative program with elements that are not only in federal law underlying that funding, but are replicated in the statutes of all fifty states. Among these is the threshold requirement that "reasonable efforts" be employed to not remove a child from his or her home. If a child is removed, there will be an expeditious hearing before a state court judge – usually called a "detention hearing."[37] At this initial hearing, contrary to the assumptions made by the Ninth Circuit, all parties are given the opportunity to present evidence. There, the state juvenile court must find the CPS undertook "reasonable efforts" not to remove the child from the home. 42 U.S.C. § 671(a)(15)(B)(i).

Where such efforts are made and confirmed by a court, the matter then proceeds with properly exhaustive safeguards to protect the "fundamental liberty interest" of parents *qua* parents. Indeed, at this initial detention hearing, the appointment of

---

Chapter 5 at 88. The established best practice for interviewing a child includes interview instructions, using rapport building, including narrative practice – before moving to the interview topic, and introducing the interview topic with open-ended questions. *Id.* at 88-100.

[37] *See, e.g.*, Cal. Welf. & Inst. Code § 315.

counsel for parents, and Guardians ad Litem for involved children, occurs. All fifty states provide counsel for parents whose children have been removed and whose parental rights are in jeopardy.[38]

One of the primary purposes of the subsequent legal process is to follow up on the required "reasonable efforts" not to remove – with a second "reasonable efforts" requirement – to reunify the child with the parent. The post detention stage is followed with a "jurisdiction" hearing at which the court may supplant parental authority *pendente lite* (while supervising a hoped-for reunification). This is followed by a "dispositional phase" where a case plan is developed to provide services to the family so that the child can safely return to the family home[39] Once it is determined that the juvenile court will take jurisdiction, the status of the child must be reviewed periodically but no less frequently than once every six months. 42 U.S.C. § 675(5)(B). At each of these review hearings, a determination must be made that reasonable efforts have been made by CPS to make it possible for the child to safely return to the child's home. 42 U.S.C. § 671(a)(15)(B)(ii). If, after between six and

---

[38] In *Lassiter v. Department of Social Services* 452 U.S. 18 (1981), this Court allowed the parental rights termination of Abby Lassiter, but her situation was extreme, and this Court's analysis emphasized that the proceedings required counsel if it would make a difference in the outcome. Accordingly, appointment of such counsel is now routine for parents in all fifty states.

[39] *See, e.g.*, California Welfare and Institutions Code §§ 355, 358.

eighteen months of efforts from CPS to help reunify the family, it appears that the family is not appropriate for reunification, only then will termination of parental rights be contemplated. At this stage, this Court must find by a now-heightened burden of "clear and convincing evidence" that the parents are "unfit" and termination is appropriate. *Santosky v. Kramer*, 45 U.S. 745 (1982).

As noted above, at each of these hearings, the parents are represented by counsel. Similarly, in all fifty states, the children are represented throughout the judicial process. The Child Abuse Prevention and Treatment Act (CAPTA), another federal-state cooperative program through which states receive federal funding, requires that a Guardian ad Litem (GAL) be appointed for a child in every case involving an abused or neglected child which results in a criminal proceeding. 42 U.S.C. § 5106a(b)(2)(A)(ix). Increasingly, the GALs appointed in each jurisdiction are attorneys.[40]

The review of the decision to remove a child from her parents' custody does not end at the juvenile court. An appellate review process exists to check the appropriateness not only of the original removal of the child and of the termination of parental rights, but of many of the intervening steps.[41] And further

---

[40] *See* National Association of Counsel for Children *The Legal System*, available at www.naccchildlaw.org/?page=legalsystem.

[41] *See, e.g.*, Cal. Welf. & Inst. Code §§ 395, 366.26(l).

protecting the reputations and private sensibilities of children and parents is the fact that in most states, the judicial process is confidential.[42] In sum, this is a civil proceeding that focuses not on punishment, but on protection, preferably by restoring the *status quo ante* as soon as possible.

CAI supports all of these safeguards and this orientation toward family preservation. Removal and foster care is disruptive to children and outcomes are uncertain. But for this Court to draw an empathy line with parents based on its own paternal and maternal instincts and love of children would be a mistake because that instinct is not universal. Most children born today are not intended, and growing up with a child's two biological parents is no longer commonplace. The percentage of children born to unwed parents has risen to forty percent. A recent important report studying 5000 children over ten to fifteen years has documented the ephemeral ties of many adults to the children living with them, and the damage caused to children from the increasingly transitory commitment of the adults in their lives.[43]

---

[42] *See* First Star and the Children's Advocacy Institute, *A Child's Right to Counsel*, 2nd Edition: A National Report Card on Legal Representation of Abused and Neglected Children, (2009), available at http://www.caichildlaw.org/Misc/Final_RTC_2nd_Edition_lr.pdf.

[43] *See* Woodrow Wilson School of Public and International Affairs and the Brookings Institution, *Fragile Families*, FUTURE OF CHILDREN, Volume 20, No. 2 (Fall 2010). This longitudinal study of children born in the 1990s and the effects of parental

(Continued on following page)

In addition, child abuse incidence has increased due to the current scourge of methamphetamine addiction, which is extremely addictive, alters maternal and paternal instinct, and is now a common factor in child abuse cases.[44]

CAI acknowledges that the many checks enumerated above to prevent improvident removal and parental deprivation are of value to children given the disruptions and disadvantages of foster care. But it is important to appreciate that there is no comparable safeguard against the failure to remove and protect – where the alternative will be continued neglect, beatings, or molestation. This protective role is one that all fifty states have assumed, underlined by the commonly enacted extant laws that require professionals who come into contact with children not only to report suspected child abuse and neglect, but making the failure to do so a criminal offense. The CPS investigation is the only societal safeguard in the direction of child protection from parental abuse.

---

disruption, sequencing of step parents and boy/girl friends, *et al.*, available at http://futureofchildren.org/futureofchildren/publications/docs/20_02_FullJournal.pdf.

[44] *See, e.g.*, Cathleen Otero, M.S.W., M.P.A., Sharon Boles, Ph.D., Nancy K. Young, Ph.D., Kim Dennis, M.P.A., *Methamphetamine Addiction, Treatment, and Outcomes: Implications for Child Welfare Workers*, Substance Abuse and Mental Health Services Administration Center for Substance Abuse Treatment, (2006), found at http://www.ncsacw.samhsa.gov/files/Meth%20and%20Child%20Safety.pdf.

If it does not occur or is hampered or delayed, there is no check in place to protect the child.

Almost five children (4.82) die every day as a result of child abuse.[45] Many researchers believe that this number understates the actual incidence of such fatalities.[46] The number and rate of fatalities have been increasing during the past few years; while this can be attributed to some degree to improved data collection and reporting, all the causes of the increase are not specifically identifiable.[47] Parents, acting alone or with another person, were responsible for 71% of child abuse or neglect fatalities in 2008.[48] In fact, fathers and mother's boyfriends are most often the perpetrators in deaths due to abuse, while mothers are most often the perpetrators of deaths due to severe neglect.[49] Studies of fatalities due to child abuse and neglect show that CPS is often aware of these families before the death occurs. In a study of the 2008 data from California, 45% of fatalities due to abuse or neglect involved a family that had been

---

[45] Childhelp.org: National Child Abuse Statistics citing 2007 data and available at http://www.childhelp.org/pages.statistics.

[46] U.S. Department of Health and Human Services, *Child Abuse and Neglect Fatalities: Statistics and Interventions* (April, 2010) at 2, available at http://www.childwelfare.gov/pubs/factsheets/fatality.pdf.

[47] *Id.*

[48] *Id.* at 4-5.

[49] *Id.*

involved with CPS in the previous 5 years.[50] CAI studied California's fatalities due to child abuse and neglect from July 21, 2006 through December 31, 2006 and found that in 82% of the cases, the family had some CPS history; in 53% of the fatalities, the family had a CPS history which was substantially related to the cause of the fatality.

The evidence underlines the importance of these CPS investigations. Of course, no examination of abuse indicia can be perfect, but the percentage of cases where deaths occur in the face of reports to CPS, and recent or then-pending investigations, is extraordinary. It is a correlation and a volume that is deeply disturbing. These alarming statistics do not count molestations, or children beaten nightly, or those who are not fed, or those whose illnesses proceed without treatment, where there is no body to bury, and hence no body to count.

While CPS is clearly crucial to the protection of children, it is unfortunately not always provided adequate resources to do appropriate and thorough investigations. These social workers receive reports of abuse and must make difficult choices.[51] Which do

---

[50] California Department of Social Services, *California Child Fatality and Near Fatality Annual Report CY 2008* (May 2010) at 19, available at http://www.childsworld.ca.gov/res/pdf/2008AnnualChildReport.pdf.

[51] A CPS worker charged with initial investigation completes 68.3 complete cases per year. This is the number of *completed* cases and does not take into consideration the other duties the

(Continued on following page)

they select for further inquiry? If the report seems troubling and is from a mandated reporter, they may have "reasonable suspicion" to inquire further. An interview of the child involved, or child witnesses, is an early requirement – and is itself necessarily based on information that does not reach probable cause sufficient to justify a search warrant. One of the common requirements as part of a supporting declaration is the reliability of the informant based on prior contacts with the declarant or the police.[52] But CPS must necessarily rely on reports from thousands of pre-designated mandated reporters, few of whom will have a long record of prior successful disclosures. Unless these thousands of sources are all designated "reliable informants" categorically, a probable cause standard is problematical as a precursor to this critical

---

CPS worker may have – duties which are ever increasing as state budget cuts lead to cuts in CPS workers and higher caseloads. U.S. Department of Health and Human Services, *Child Maltreatment 2008* at 9, found at http://www.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf.

[52] See *Illinois v. Gates*, 462 U.S. 213 (1983). CAI author Fellmeth has obtained and defended numerous search warrants as a public prosecutor. An accurate description of the typical elements from a widely used online source: "Any information that is provided in an affidavit may be considered reliable when the informant: has been previously established as a reliable source, implicates themselves in the crime, provides information that is at least partially verified, is the victim of the crime, is a witness to the crime, or is an officer of the law. In most cases, when a reliable informant provides information about the likelihood of facts and circumstances related to a crime," found at http://www.criminal-law-lawyer-source.com/terms/probable-cause.html.

step in the investigation. Importantly, it is a step that can often explain the cause of a mandated call with explanatory information indicating innocence, in which case the inquiry is resolved without further effort. On the other hand, if obstacles are placed in the path of this crucial step, acquiring probable cause may be unrealistic, or may require so much evidentiary time and difficulty that the investigation may be delayed (as with the instant interview) as other work is necessarily prioritized above it.

Exacerbating the difficulty in court orders as a condition precedent is the ongoing nature of most child abuse. It is typically not like a single-event bank robbery or homicide, but involves continuing harm and risk to often helpless victims. This continuation pattern is well documented and can be deduced from the statistics noted above of child abuse fatalities – most of which occur with prior CPS histories. Indeed, if the abuse involves beatings, incidence and severity may well increase with notice to the abuser of State concern, since the child may be blamed.

III. The Four-Part Balancing Test Commends Rejection of the Categorical Requirement of Parental Consent or Probable Cause Warrants Prior to CPS Child Interviews

CAI urges the explicit adoption of this above-outlined four-part test for Fourth Amendment review generally. Applying such a distilled test to CPS interviews produces the following analysis:

(A) State Interest in (or Justification for) the Search

Two aspects here inform our judgment of the "state interest" or justification for intrusion. First, the State has assumed the role of protector. Every State has mandated reporting requirements. As discussed above, each has announced to its citizenry through child protection laws similar to those here at issue that it has assumed the task of child protection from abusive, unfit parents. Each State has created a civil court oriented system to provide detailed checks on the state's exercise of the protective role assumed.

Second, the weight of the "state interest" is enhanced by its motivation to protect the suffering weakest among us from dangerous or exploitive bullies who molest or beat or neglect those who have little voice or power. This is not the State acting for itself. It does not gain tax revenue or power – rather it spends public sums and assumes upon itself a difficult burden of care. It is not the result of monied influence, nor is it a response to a crowd shouting for blood and retribution. It is intervening to protect a weak private interest from an abusive powerful one.

As discussed in detail above, those against whom the State may act for the benefit of such weaker parties are afforded deference in the process – where the search and seizure or inquiry warrants State measures of child protection. As discussed in detail above, the State has a federal obligation to use "reasonable efforts" not to remove the child from the

custody and care of her parents, to appoint counsel, and to hold hearings and require the state to meet its burden to prove endangerment and unfit parental status – the last by "clear and convincing evidence." The process is generally confidential. However, the check to prevent continued abuse of the child is extremely limited – it rests entirely on the State's ability to detect and to investigate abuses. The state action in this context is properly subject to a measure of the rather generous solicitude this Court has applied to the State's interest in regulating alcohol, investigating arson, or combating drugs.[53]

The dangers to these children are rarely manifested on the public streets. By their very nature, they *require* a measure of intrusion. The *situs* of child molestation and beatings and neglect means that the State cannot protect these children by relying on surveillance cameras in banks and stores, or by a bullet wound showing up in the ER, or by a report to the police by the victim. The investigation does not begin with probable cause for a warrant. And it is certainly not to be guided by required consent from parents or caretakers who, in most of these cases, are the problem or too often regrettably will protect a spouse or boyfriend who is the source of the problem, as discussed above.

---

[53] See citations to the numerous areas of distinct Fourth Amendment policy variation, including generous allowance of searches without even reasonable suspicion in these and other areas of apparently "compelling state interest."

The "justification for state interest" element is here underlined by the consequence of the Ninth Circuit's preconditions for interviewing child victims or witnesses. The probable cause one needs for such qualification often depends upon the very interviews barred by its absence.[54] Accordingly, the elements of required probable cause warrant or parental permission proffered below can too often form a classic "Catch-22" barrier to these protective inquiries. These are not cases where we have the kind of resources the popular culture suggests is extant in its plethora of "CSI" detective shows, nor in the depiction of attorneys on the civil side. These are social workers who have to screen information which necessarily rises only to the "suspicion" level. And who must investigate many cases not in a month or a week, but in a day.[55]

---

[54] A publicized recent manifestation was revealed by Elizabeth Smart in her recent testimony against her abductor on November 10, 2010. Just weeks after her abduction she was in public wearing a veil and detective Jon Richey, aware that Elizabeth Smart was missing and searching for her, asked her apparent "parent" to lift the veil so he could view her face. Her abductor, Brian David Mitchell, citing religion and parental privilege, refused. Detective Richey walked away and Elizabeth endured continued abduction and nightly degradation for another nine months. See http://abcnews.go.com/US/wireStory?id=12109270&page=2. Although this example may be unusual and stark, and although stranger-caused abuse is relatively rare, blockage of officials concerned about child protection from potential victims leads to similar consequences with no publicly clamorous search.

[55] Note that CPS workers do not command substantial influence for allocation of state funds. The 2010-11 California budget

(Continued on following page)

The opinion below implicitly recognizes the weight given to the "special need" to control children in the classroom. Thus, it seeks to distinguish this Court's three major decisions pertaining to school searches: *TLO, Acton*[56] and *Earls*.[57] But a general reference to "educational mission" or "school order" muddles what is the directly applicable compelling State interest. It is apparently a sufficient interest to justify a rather intrusive search – the inventory of a student's purse or, more starkly, of personal urine production and testing. School order is hardly an immediate emergency in *TLO*, and *Acton* applies to anyone who wants to play athletics after school. *Earls* allows urine testing of any student seeking to play in the band, attend an honor society meeting, or banter with the Future Farmers of America. These are hardly classroom settings. And the latter intrusive drug testing "searches" appear to lack even a "reasonable suspicion" qualifier. Is the "compelling state justification" really greater in *Earls* than in a case where there is reasonable suspicion and the State interest is

---

cuts their appropriations by $80 million. Note also that CAI has documented the excessive caseloads of counsel for children (e.g., at 380 in Sacramento County) and courts who would presumably be weighing such orders (over 1,000 children per juvenile court judge in Sacramento). See evidence adduced in *E.T. v. George* (cited in note 2, *supra*), now pending before the Ninth Circuit, at http://www.caichildlaw.org/caseload.htm.

[56] *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995).

[57] *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002).

nothing the child is doing wrong, but stopping his or her molestation? Schools are a major arena of child abuse detection. They are also often the primary "safe" location to interview a child, away from her abuser. Presumably, the "state's interest" in having its students not suffering from neglect, beatings and molestation rises to the level of guaranteed sobriety amongst the band's brass section, as Justice Ginsburg humorously noted in her *Earls* dissent.

(B) Degree of Intrusion

The element of "degree of intrusion" encompasses a number of factors as outlined *supra*: expectation of privacy, nature and location of the intrusion, nexus to the State interest justifying it and opportunity for a warrant.

(1) Degree of Intrusion: Expectation of Privacy/Nature and Location

The holding below is applied to an intrusion that is not a typical search or seizure at all, but to an interview – albeit a somewhat lengthy one.[58] The child

---

[58] The confinement of a student in the principal's office or extensive questioning or detention for two hours after school is not uncommon. The separation from the classroom aspect is preferable for such personal questions. Note that school officials receive broad license for such intrusions as a necessary part of "school management", and it would appear that CPS inquiry to protect a child from rape or abuse warrants at least that deference as a compelling state interest.

is not a possession of the parent such that interviewing him or her is some sort of "seizure" of a personal item. The Seventh Circuit has held that removing a child from a class to be questioned by a social worker and a police officer about alleged abuse is a form of "seizure." *Doe v. Heck*, 327 F.3d 492, 509 (7th Cir. 2003). But at what point does the "we have some questions to ask you?" turn into a seizure? This is not a ten-hour, no-food-or-rest-room, bright-lights-in-the-face grilling. And some focused inquiry – including uncomfortable questions – is often required and can occur in a setting of child fear from adult threats, or Child Abuse Accommodation Syndrome protection of their own abusers.[59]

The overall degree of intrusion is a legitimate part of a rational search and seizure limitation balancing. In its "stop and frisk" body of law, this Court (even in the stricter context of straight criminal investigations) countenances peace officer stops of citizens, and includes the right to frisk for weapons beyond the asking of questions.[60] The standard for such a stop is "reasonable suspicion" (the basis *amicus* CAI urges be applied here). The circumstances of the stop, its length, the intrusiveness of the frisk, all turn on the "totality of the circumstances" which need not be based on the personal knowledge of the intruding officer.[61]

---

[59] Roland Summit, M.D., *The Child Abuse Accommodation Syndrome*, CHILD ABUSE & NEGLECT, Vol. 7 (1983) at 177-193.

[60] See citations *supra*, at note 12.

[61] See *U.S. v. Cortez*, 449 U.S. 411 (1981); *U.S. v. Hensley*, 469 U.S. 221 (1985).

As noted above, the reasonable expectation of privacy is somewhat reduced by its location – a school setting. In that location, a purse search is justified by "reasonable suspicion." *New Jersey v. TLO*, 469 U.S. 325 (1985). One stark precedent permitting a search *a fortiori* to a school interview is *Wyman v. James*, 400 U.S. 309 (1971). There, the Court upheld a state law permitting welfare case workers to enter a residence without a warrant, finding that the Fourth Amendment did not apply where the purpose was not an arrest or other criminal sanction, but the potential termination of welfare benefits. The interview in the instant case did not involve state trespass into the bedroom or home or place of work of the parents.

(2) Degree of Intrusion: Nexus

Clearly, the nature of the intrusion is closely connected with the applicable compelling state interest. The interview was conducted by a social worker whose duties center on child protection. The questions pertained to the abuse at issue.

(3) Degree of Intrusion: Civil vs. Criminal, Target vs. Protection Facilitation

The opinion below makes much of the fact that criminal offenses may be involved and that a police officer was present. There is an interesting philosophical issue about why the degree of intrusion is so categorically enhanced where a criminal investigation is at issue. In theory, society selects only the most

serious and damaging private acts to criminalize, and its work to stop and deter crime arguably warrants a strong measure of "compelling state interest" status. On the other hand, the "degree of intrusion" prohibited by precedents is elevated where incursions are by criminal law enforcing peace officers, with particular concern over armed police search based on discretion without clear criteria. However, it is unclear why such a basis for concern would apply to searches that are instigated and conducted by CPS civilly, or would have occurred substantially as conducted with or without a criminal enforcement aspect.

Note that the other recent school setting precedents of this Court discussed above (*New Jersey v. TLO*, 469 U.S. 325 (1985), followed by *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995), and then *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002)) all involve commonly prosecuted criminal drug offenses. There is no stated limitation on school officials making such referrals to law enforcement.

The interview in the instant matter was not undertaken to effectuate an arrest of the child.[62] Its

[62] Note that the "target" vs. "witness" delineation was crucial to this Court's decision in *Illinois v. Lidster*, 540 U.S. 419 (2004). There, a roadblock stopped a multitude of drivers without any probable cause or reasonable suspicion. But the target of the stops and questioning were not the drivers intruded upon. Rather, the drivers were potential witnesses to a crime in the vicinity and the stops were upheld, as was the arrest of one driver for DUI after nearly hitting an officer at the roadblock.

purpose was to ask questions about the possible victimization of the child. Whether the interview was insensitive, rude, too long or included any of the excesses focused upon by the opinion below does not justify the *non sequitur* remedy of a categorical set of obstacles to *bona fide* civil inquiry for child protection.

(C) Opportunity for a Warrant

The work of state Child Protective Services exists in a world of continuing abuse. It is not the investigation of a crime, incident, or problem that has concluded in order to ascribe guilt. It is an inquiry focusing on a child who, under the enabling statutes common in the States, is suffering from existing endangerment. Time is of the essence. And the probable cause necessary for a warrant is often dependent on the very interviews that would require a warrant or similar order under the opinion below, leading to the conundrum discussed above. The instant interview occurred the first school day after the allegedly offending parent was released from jail and CPS potentially could have private access to the child.

(D) Factual Basis for the Intrusion

In *State v. Hunt,* 406 P.2d 208 (Arizona 1965) a housekeeper reported that she observed an injured child in the Hunt household and told her mother. The housekeeper's mother called the sheriff. Peace Officer Bernal entered the home. The court upheld the entry,

the search for the child, and the interviews on the scene. Although Mrs. Hunt was arrested and prosecuted for assault and criminal child abuse, and although officer Bernal lacked sufficient probable cause for a warrant, the court wrote:

> . . . he [Bernal] is acting as the agent of the extension of the Arizona Juvenile Court. . . . for the protection of the child. This is not a criminal proceeding. The officer is not investigating [here] the commission of a crime, or gathering evidence for the prosecution of a crime, but is exercising lawful authority to take the child into protective custody, subject to the future disposition of the child under the juvenile court's protective authority, should the same be invoked by petition. We feel that officer Bernal, or any other peace officer . . . with reasonable cause to believe that a child's health, morals or welfare were being endangered therein, had not only the lawful *right*, but the lawful *duty* to enter the premises investigate, and take the child into custody, if necessary, with or without a search warrant, and with or without consent of all of the persons having proprietary interests in the premises. . . . we recognize that the magistrate could not have issued a search warrant . . . Any idea that a child is the personal 'property' of its parent is patently absurd . . . (emphasis supplied, at 214).

The state intervention at issue here was not in a home and involved a substantially lower degree of intrusion. It had less of a criminal aspect, with the

interview primarily conducted by a social worker. It was based on facts somewhat more reliable than the double hearsay from a housekeeper in the *Hunt* case, cited above. Importantly, it was not based on the *animus* of any state official or agency, but rather on a *bona fide* belief, from information received, of serious child endangerment.

CONCLUSION

This Court has not prohibited intrusive body searches at every airport in the nation – notwithstanding no factual basis for any of the individual searches – and indeed with virtually no probable cause and no warrant justifying any search. Body cavities are now being screened, and the false breasts of cancer victims inspected, because of a passenger one year ago who stuffed explosives in his underwear and failed to detonate them. The reason for this license, if honestly faced, is the overwhelming weight given to this "compelling state interest," to wit – strong empathy lines we all share with anyone even contemplating a plane explosion – a sensitive reminder of "9/11", and a transportation mode many of us and our loved ones use.

CAI does not anticipate airport search license to protect its endangered child clients. And we would readily stipulate to a list of absolute requirements for State interviews of children short of those suggested above. These might well include required consent of

parents where they are affirmatively not implicated in the suspected abuse. We would add that no such state intervention properly occurs based on the *animus* of any state official. It must not be a subterfuge for criminal law enforcement or the product of peace officer puppeteering. It must be a *bona fide* effort to protect children, with the criminal enforcement aspect ancillary and supplemental. And we agree that a "reasonable suspicion" standard may be applied – well beyond the quantum of cause demanded in many of the areas of State intrusion lacking the merits of child protection.[63] But we note that such reasonable suspicion is here present, and – critically – is present wherever a mandated report is received from someone with apparent (a) knowledge and (b) objectivity about a child's endangerment.

We would ask that the four-element formulation distilled from Court precedents cited above serve as the guide for Fourth Amendment analysis. And that often unstated balancing underlies most clearly this Court's most recent decision in *Safford v. Redding* (*supra*).

This Court is too often the destination for excessive attorney hyperbole, and it is commonly assured by its supplicants that a contrary ruling will result in the collapse of heaven upon the supine heads of us

---

[63] "Reasonable suspicion" involves something more than a vague suspicion (*e.g.*, high incidence of crime or "suspicious looks") but rather some articulable, objective facts. *See Brown v. Texas*, 443 U.S. 47 (1979).

all. Nevertheless, CAI respectfully sounds an alarm. The sky will not fall on all of us, but it will upon some. We well know, as the evidence cited above suggests, that a large number of children will die if CPS is impeded in its task – an appalling and largely unreported number already die from child abuse with prior or pending CPS investigations. Beyond deaths, we well know that a larger number will suffer continued nightly rape, and a still larger number endure beatings and torture from those upon whom they depend for everything. This notice is not hyperbole. For the past 21 years, we have been inside the CPS/foster care system, representing children who are regrettably too hidden from the federal courts and from the public. It is not a comfortable world, but it is one we share with you. And we respectfully ask that it be considered in rendering this important decision.

Respectfully submitted,

ROBERT C. FELLMETH
Counsel of Record
Price Professor of Public Interest Law
Executive Director,
CHILDREN'S ADVOCACY INSTITUTE
UNIVERSITY OF SAN DIEGO SCHOOL OF LAW
5998 Alcalá Park
San Diego, CA 92110
(619) 260-4806
cpil@sandiego.edu

JULIANNE D'ANGELO FELLMETH
Administrative Director/
Supervising Attorney,
CENTER FOR PUBLIC
INTEREST LAW
ELISA WEICHEL
Administrative Director/Staff
Attorney, CHILDREN'S
ADVOCACY INSTITUTE
EDWARD HOWARD
Senior Counsel,
CHILDREN'S ADVOCACY
INSTITUTE
CHRISTINA RIEHL
Senior Staff Attorney,
CHILDREN'S ADVOCACY
INSTITUTE

Counsel for Amicus Curiae
Children's Advocacy
Institute

Nos. 09-1454, 09-1478

In The Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

JAMES ALFORD
Deschutes County Deputy Sheriff,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE CHILDREN'S LAW SECTION OF THE STATE BAR OF MICHIGAN AS AMICUS IN SUPPORT OF RESPONDENT

ELIZABETH S. WARNER*
2464 Spring Arbor Rd.
Jackson, MI 49203
(517) 787-3560
eswarner@aol.com
**Counsel of Record*

JODI M. LATUSZEK
SPEAKER LAW FIRM PLLC
230 N. Sycamore St.
Lansing, MI 48933
(517) 482-8936
jlatuszek@speakerlaw.com

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS 1

SUMMARY OF ARGUMENT 2

ARGUMENT 7

I. FEDERAL LAW HAS SOME VALUE TO ASSESSING THE POLICY ARGUMENTS OF THE PARTIES AND THEIR AMICI. CONGRESSIONAL FINDINGS AND LAWS PROVIDE AN EXPRESSION OF NATIONAL CHILD WELFARE POLICY AND BEST PRACTICES IN CIVIL AND CRIMINAL INVESTIGATIONS OF CHILD ABUSE AND NEGLECT 7

A. National Child Protection Policy Seeks Protection Of Children And Their Families In Child Abuse Investigations 7

1. Congress Has Made A Finding That An Incompetent Sexual Abuse Investigation Can Harm Children And The Legal System 9

2. Federal Law Recognizes The Importance Of Enforcing The Civil Rights Of The Family In A Child Abuse Investigation 10

3. Congress Recommends That The Non-Offending Parent Be Included In The Investigation 14

TABLE OF CONTENTS – Continued

Page

B. The Child Has No Legal Protector Besides A Parent Or A Judge During The Investigative Phase. The Child's Right To Counsel Commences Later With The Filing Of A Court Dependency Case 15

II. NO RESOLUTION ON THE CONSTITUTIONAL ISSUE CAN BE MADE BASED ON A FEW STATE LAWS ON CHILD INTERVIEWS. THE INVESTIGATION LAWS PROVE POLICE ARE USUALLY NOT WELCOME AT SCHOOL. STATE JUDGES ARE ALREADY OBLIGATED BY STATE LAW AND FEDERAL COURTS TO DECIDE REQUESTS FOR INVESTIGATION ORDERS. THEREFORE, THE JUDICIAL BURDEN OBJECTION FAILS 16

A. State Child Abuse Investigation Laws Are Similar Due To Federal Funding Incentives. They Are Not Independent Policy Choices By States Supporting A Reasonableness Argument 17

B. State Laws Must Yield To The Constitution 21

C. Most Interview Laws Do Not Support The Police Officer's Presence At A School Interview 22

TABLE OF CONTENTS – Continued

Page

D. The Juvenile Judiciary Will Not Be Burdened By A Constitutional Obligation To Rule On Requests For Investigation Orders. This Is Already Part Of Their Duties 23

III. ALL PARTICIPANTS IN THE CHILD WELFARE SYSTEM BENEFIT FROM A COURT DECISION THAT SUPPORTS A RELIABLE, HUMANE, AND LAWFUL CHILD INTERVIEW ABOUT ABUSE. QUESTIONABLE INTERVIEWING PRACTICES CREATE AMBIGUITY IN THE JUVENILE LEGAL SYSTEM THAT DOES NOT FURTHER ITS CHILD PROTECTION MISSION 27

CONCLUSION 33

TABLE OF AUTHORITIES

Page

CASES:

District of Columbia v. Heller, 554 U.S. 570 (2008) 23

Ferguson v. City of Charleston, 532 U.S. 67 (2001) 18

Illinois v. Lidster, 540 U.S. 419 (2004) 6, 27

Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001) 21, 22

Monroe v. Pape, 365 U.S. 167 (1960) 22

Prince v. Massachusetts, 321 U.S. 158 (1944) 27

Saenz v. Roe, 526 U.S. 489 (1999) 17

Santosky v. Kramer, 455 U.S. 745 (1982) 2, 22

Stanley v. Illinois, 405 U.S. 645 (1972) 2, 23

Suter v. Artist M., 503 U.S. 347 (1992) 19, 20

United States v. Stevens, ___ U.S. ___, 130 S. Ct. 1577 (2010) 23

FEDERAL CIRCUIT CASES:

Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986) 26

Dubbs v. Head Start, Inc., 335 F.3d 1194 (10th Cir. 2003) 26

Good v. Dauphin County Social Services for Children & Youth, 891 F.2d 1087 (3d Cir. 1989) 25

TABLE OF AUTHORITIES – Continued

Page

Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009) 31, 32

Roe v. Texas Dep't of Protective & Regulatory Services, 299 F.2d 395 (5th Cir. 2002) 25

Tennenbaum v. Williams, 193 F.2d 582 (2d Cir. 1999) 25

Wallis v. Spencer, 202 F.2d 1126 (9th Cir. 2000) 26

FEDERAL DISTRICT COURT CASES:

O'Donnell v. Brown, 335 F. Supp. 2d 787 (W.D. Mich. 2004) 16

Walsh v. Erie County Department of Job & Family Services, 240 F. Supp. 2d 731 (N.D. Ohio 2003) 17

STATE CASES:

H.R. v. Alabama Dep't of Human Resources, 612 So.2d 477 (Ala. App. 1992) 34

State v. Weaver, 964 P. 2d 713 (Mont. 1998) 30

CONSTITUTIONS, STATUTES AND REGULATIONS:

U.S. Const. amend. I 22

U.S. Const. amend. IV ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES:

42 U.S.C. § 5106c(a)(1) (2006), Pub. L. No. 102-95, § 109 9

42 U.S.C. § 5101 (note) (2006), Pub. L. No. 102-295, tit. I, § 102(a)(7), 106 Stat. 188 (1992 CAPTA amendment) 11

42 U.S.C. § 5106a(b)(2)(A)(xiii) 15

42 U.S.C. § 5106a(b)(2)(xix) (2006) 11

Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 670 to 676 (2006) 19

Adoption Promotion Act of 2003, Pub. L. No. 108-145, 117 Stat. 1879, 42 U.S.C. § 673b (2006) 19

Child Abuse Prevention and Treatment Act, 42 U.S.C. 5101 *et seq* ..... *passim*

Child and Family Services Improvement Act of 2006, Pub. L. No. 190-288, 120 Stat. 1233, 42 U.S.C. § 621 *et seq* 19

Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949, 42 U.S.C. § 1305 (Supp. 2009) 19

Pub. L. No. 93-247 (Jan. 31, 1974), 88 Stat. 4, 42 U.S.C. §§ 5101 to 5119c (2006), amended and reauthorized, Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36, 117 Stat. 795 (June 26, 2003) 8, 15

TABLE OF AUTHORITIES – Continued

Page

Pub. L. No. 105-89 19

Pub. L. No. 108-36, 114(b)(1)(xix), 117 Stat. 810..... 11

Strengthening Abuse and Neglect Courts Act of 2000, Pub. L. No. 106-134, 114 Stat. 1266 (Oct. 17, 2000), 42 U.S.C. § 670 (2006) 19

Victims of Child Abuse Act of 1990, Pub. L. No. 101-647, tit. II, sub. tit. A, 104 Stat. 4792 (Nov. 29, 1990), 42 U.S.C. §§ 13001 to 13004 (2006) 8, 9, 14, 15

STATE STATUTES:

Ala. Code § 9.301(12) (2009) 24

Ala. Code § 26-14-7(c) (2009) 26

Ark. Code Ann. § 12-12-510(b) (2009) 24

Colo. Rev. Stat. § 19-3-308(3)(b) (West 2005 & Supp. 2010) 24

16 Del. Code Ann. § 910(a)(1)(3) (2003 & Supp. 2010) 24

Fla. Stat. Ann. § 39.301(12) (West 2010) 24

325 Ill. Comp. Stat. 5/7.5 (West 2010) 24

Iowa Code Ann. § 232.71B.5 (West 2010) 24

Kan. Stat. Ann. § 38-226 22

922 Ky. Adm. Regs. 1:330(3)(20) 25

Ky. Rev. Stat. Ann. § 620/040(5)(a) (Lexis Nexis 2008) 25

TABLE OF AUTHORITIES – Continued

Page

La. Child Code 613(A) (2004) 25

Minn. Stat. § 626.556(10)(e)-(f) (West 2011) 25

Neb. Rev. Stat. § 28-713 22

N.H. Rev. Stat. Ann. § 169-C:34(IV) (West 2002 & Supp. 2010) 25

N.H. Rev. Stat. Ann. § 169-C:38(IV) (West 2002 & Supp. 2010) 22

N.M. Stat. Ann. 1978 § 32-A-4-3 22

N.Y. Fam. Ct. Act § 1034(2) (2009) 25

N.C. Gen. Stat. § 7B-303 (2009) 25

Ore. Rev. Stat. § 419b/045 22

S.C. Code 1976, § 63-7-380 22

Utah Code Ann. § 78A-6-106(1) (2003) 25

MISCELLANEOUS:

Timothy L. Arcaro, *Child Victims of Sexual Abuse and the Law,* 12(3) Mich. Child Welfare L.J. 2 (2009) 3, 28, 29

Mark R. Brown, *Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process,* 65 Ohio St. L. J. 913 (2004) 4

Child Maltreatment 2009, 94 (U.S. Department of Health & Human Services), available on line at the Children's Bureau web site at www.childwelfare.gov 16

TABLE OF AUTHORITIES – Continued

Page

Doriane L. Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment,* 47 Wm. & Mary L. Rev. 413 (2005) 2

Zuzana Murarova & Elizabeth Thornton, *Federal Funding for Child Welfare: What You Should Know,* 29(3) ABA Child Law Practice 33 (2010) 21

Vincent J. Palusci, *Identifying and Reporting Child Abuse and Neglect,* 10(3) Mich. Child Welfare L.J. 17 (2007) 30

Miriam Rollin, Frank Vandervort, Ann M. Haralambie, *Federal Child Welfare Law and Policy: Understanding the Federal Law and Funding Process,* in *Child Welfare Law and Practice* (Marvin Ventrell & Donald N. Duquette, eds., Bradford Publishing Co., 1st ed. 2005) 7, 20

Marvin Ventrell, *The History of Child Welfare Law,* in *Child Welfare Law and Practice* (Marvin Ventrell & Donald N. Duquette eds., 1st ed. 2005) 4

Hollida Wakefield, "Guidelines in Investigatory Interviewing of Children: What is the Consensus in the Scientific Community?" 24(3) Amer. J. Forensic Psychol. 57 (2006) 29

INTEREST OF AMICUS[1]

The Children's Law Section for the State Bar of Michigan is comprised of 492 members. Unlike other groups appearing as amici in this case, the Children's Law Section is comprised not only of attorneys who represent parents, children, and the Department of Human Services in child protective proceedings, but membership also includes the juvenile judiciary. The fact that our members play different roles and enter at different stages of child protection cases provides a unique vantage point for assessing the need for consistent and reliable procedures at the investigative phase of child protection cases.

The impact of a rule of law governing how interviews of suspected victims of child abuse are conducted will be felt by all of our members who, despite their different roles in the system, share an interest in developing a legal landscape that offers the best outcomes for children and their families – even if they are involved in a CPS investigation. That interest compels the Children's Law Section, as amicus curiae, to highlight the importance of a rule from this Court that would result in consistent, humane, and lawful interviews of suspected victims

---

[1] Counsel of record, Elizabeth Warner, and co-counsel Jodi Latuszek, authored this brief without compensation by the party or anyone else. The Children's Law Section of the State Bar of Michigan paid for the preparation and submission of the brief. For consent to file the brief, counsel relied on the written blanket consents provided by all the parties to all amici.

of child abuse. Interviews with those core features are interviews that will ultimately serve the best interest of the children at the very heart of CPS investigations because they produce results that can be used in court to secure legal results that will protect them from further abuse.

SUMMARY OF ARGUMENT

The protection of children from unsafe homes and unfit caretakers is the task of public child welfare agencies, the state civil juvenile courts, and criminal law enforcement. Sadly, a child can be hurt more than helped by state intervention. Some degree of victimization of a child by the official response to a report of abuse or neglect is inherent in these cases.[2] Harm can occur whether the abuse accusation is true or not. Sometimes the juvenile justice system separates a child from a safe parent for a variety of reasons, including a flawed protective services investigation. Without question, that is an intolerable harm to a child.[3] For confirmed sexual abuse victims,

---

[2] Doriane L. Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 Wm. & Mary L. Rev. 413, 540 (2005) ("The violence that these official investigations do to the children can be just as destructive as the private violence they seek to avert.").

[3] *Santosky v. Kramer*, 455 U.S. 745, 760-761 (1982) ("[T]he child and the parents share a vital interest in preventing erroneous termination of their natural relationship"); *Stanley v. Illinois*, 405 U.S. 645, 652 (1972) ("[T]he State registers no gain

(Continued on following page)

the failures of the legal system have "frequently resulted in children being victimized by the abuse and then re-victimized by the judicial system through misguided prosecutorial efforts."[4] True or not, mistreatment or manipulation of a child in an abuse investigation should be not tolerated by any court, especially when the investigators violate laws or the Constitution. Simply put, the rule of law is the best child protection.

If this court decides it has jurisdiction in Question 2, the amicus supports affirming the Ninth Circuit ruling on Question 1. Amicus supports constitutional protection for the respondent child S.G., a nine year old special education student who was seized, detained, and interviewed by CPS and police investigators at her school, until she accused her father of sexually abusing her. The lower court rule works on a practical and legal level. The exigent circumstances exception will allow officials to protect a child from serious harm when time and immediate danger do not allow the prior involvement of the juvenile courts. The child interview requirement for either parental consent, or a court order based on probable cause, properly align the investigative phase of a child protective services case with both the

---

towards its declared goals when it separates children from the custody of fit parents.").

[4] Timothy L. Arcaro, *Child Victims of Sexual Abuse and the Law*, 12(3) Mich. Child Welfare L.J. 2, 2 (2009).

Constitution and the welfare of a defenseless child.[5] The petitioners advocate for essentially unsupervised discretion for the child welfare workers. The petitioners say a court interview order would burden them and the court. But the juvenile judiciary is capable of handling the necessary court orders, as it does now routinely on other investigation tasks.

The constitutional rules for child protective services (CPS) investigations should be considered with an understanding of the civil juvenile legal system that governs that investigation and the dependency case that may follow.[6] A basic understanding of the

---

[5] Judicial review by the warrant process reduces harmful mistakes for the child and her family. Mark R. Brown, *Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process*, 65 Ohio St. L. J. 913, 979 (2004) (Summary rescues of children without warrants increases the volume of court cases, but "translates into more mistakes, which in turn result in more children being needlessly placed in foster care.").

[6] "Dependency court is that part of the juvenile court that handles child maltreatment cases. A child who has been adjudicated maltreated or is under state custody is often referred to as a dependent child. Child maltreatment is the general term used to describe all forms of child abuse and neglect that give rise to dependency court jurisdiction." Marvin Ventrell, *The History of Child Welfare Law*, in *Child Welfare Law and Practice* 113-114 (Marvin Ventrell & Donald N. Duquette eds., 1st ed. 2005). "Dependency" is the most common name for the child protection case filed by a public child welfare agency in a civil court. These cases go by other names, like abuse and neglect, or child-in-need-of-aid. This brief refers to the civil court handling dependency cases as a "juvenile court," but the cases may be in a probate, family, surrogacy, or other specialized court. *Id.* at 139. At one time criminal prosecution was the exclusive remedy for

(Continued on following page)

evidentiary requirements of dependency cases, and the capabilities of the juvenile judiciary, is important to assess some of the broad and unsupported arguments of the petitioners. Because CPS workers appear much more frequently than police officers in our civil court system, the focus will be on them in this brief.

Part I identifies the federal laws relevant to these investigations. Congressional findings and enactments are the best sources for arguments based on child welfare policy. The text and context of Congressional enactments do not support the broad generalizations and justifications attributed to them by the petitioners and their amici.

Part II discusses state laws on child interviews at school and other locations. Reliance on the state laws does not answer the constitutional question presented in this case. Numerous state laws that are consistent in permitting some interviewing practices do not demonstrate that the petitioners' tactics were constitutionally reasonable in this instance. Those state laws simply reflect federal funding requirements for states to enact these laws. State statutes do not define or obliterate constitutional rights. Many states permit CPS investigators to interview children at school. Very few of them extend that permission to a

---

child abuse. Now the dependency court in the last half of the 20th Century has become an "active tribunal to determine whether a child is abused or neglected, and if so, what disposition is appropriate" for the child's safety and welfare. *Id.* at 138.

police officer, like Deputy Alford. The petitioners' judicial burden argument is weakened by the fact that existing law already requires judges to rule on requests for investigation or interview orders.

Part III explains the harm to the juvenile justice system from an unregulated child interview like the one that occurred in this case. This adverse impact on the civil dependency case of flawed interviewing practices is a relevant consideration if the Court applies the balancing test in *Illinois v. Lidster* as proposed by the petitioners.[7] All parties to a dependency case benefit from a child interview that is humane, reliable, and lawful. Anything less leaves a factual ambiguity that does not further the child protection goals of the juvenile court.

---

[7] *Illinois v. Lidster*, 540 U.S. 419 (2004).

ARGUMENT

I. FEDERAL LAW HAS SOME VALUE TO ASSESSING THE POLICY ARGUMENTS OF THE PARTIES AND THEIR AMICI. CONGRESSIONAL FINDINGS AND LAWS PROVIDE AN EXPRESSION OF NATIONAL CHILD WELFARE POLICY AND BEST PRACTICES IN CIVIL AND CRIMINAL INVESTIGATIONS OF CHILD ABUSE AND NEGLECT.

A. National Child Protection Policy Seeks Protection Of Children And Their Families In Child Abuse Investigations.

The petitioners cite federal laws for the proposition that the investigation tactics used in this case were lawful and appropriate. Yet, the citation is unavailing because Congress does not make much substantive law in this area, and the petitioners are appropriately not claiming that it has.[8] Their argument apparently is that their actions must be reasonable under the Fourth Amendment if Congress has suggested their practices to the states. Therefore,

---

[8] "[M]ost provisions of these statutory schemes are not intended to and do not establish substantive law that applies to individual cases." Rather, a failure to adopt a federally compliant state plan can result in fines against the state. Miriam Rollin, Frank Vandervort, Ann M. Haralambie, *Federal Child Welfare Law and Policy: Understanding the Federal Law and Funding Process*, in *Child Welfare Law and Practice* 151 (Marvin Ventrell & Donald N. Duquette, eds., Bradford Publishing Co., 1st ed. 2005).

their actions must be reasonable for Fourth Amendment purposes because, in essence, they are following national child protection policy. For those federal law based arguments, it is worthwhile to look at the text of those laws on subjects that both sides have introduced into this discussion. That would be on the topics of child harm, non-offending parents, family rights, and legal protectors for the child. This law based analysis, devoid of policy rhetoric, reveals that federal laws do not coincide as definitively with their side as petitioners claim.

Congress has made findings, and enacted laws, relevant to the investigative phase of a child welfare case.[9] Two stand out. One is the Child Abuse, Prevention and Treatment Act of 1974 ("CAPTA").[10] CAPTA deals with mandatory reporting laws for child maltreatment and the investigative response to those reports. The other one is the Victims of Child Abuse Act of 1990 ("VOCA"),[11] which suggests best practices for investigation of child abuse cases.

---

[9] State law remains the primary source of legal rules for many aspects of the child protection case. The procedural rules of juvenile court proceedings are local. The adjudicative, or trial, phase of the case is governed primarily by state law. State legislatures make the substantive law for juvenile court jurisdiction and the grounds to terminate parental rights.

[10] Pub. L. No. 93-247 (Jan. 31, 1974), 88 Stat. 4, 42 U.S.C. §§ 5101 to 5119c (2006), amended and reauthorized, Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36, 117 Stat. 795 (June 26, 2003).

[11] Pub. L. No. 101-647, tit. II, sub. tit. A, 104 Stat. 4792 (Nov. 29, 1990), 42 U.S.C. §§ 13001 to 13004 (2006).

1. Congress Has Made A Finding That An Incompetent Sexual Abuse Investigation Can Harm Children And The Legal System.

Congress has found that the investigation of child abuse can harm children. One of the findings of VOCA in 1990 was that "in such cases, often the system does not pay sufficient attention to the needs and welfare of the child victim, aggravating the trauma that the child victim has already experienced." 42 U.S.C. § 13001(4) (2006), Pub. L. No. 101-647, tit. II, sub. tit. A, § 211, 104 Stat. 4792 (Nov. 29, 1990). In a 1992 amendment to CAPTA's grant program, Congress singled out the special need to limit additional trauma caused by investigations in child sexual abuse and exploitation cases. 42 U.S.C. § 5106c(a)(1) (2006), Pub. L. No. 102-95, § 109.

The petitioners give mixed messages on where they stand on this truth that a sexual abuse investigation can harm a child. Camreta clearly endorses it. Brief Camreta, 11 ("The government has a compelling interest in conducting child-abuse investigations in a manner that is least likely to be traumatic for the child[.]"). Alford agrees that at least this child was upset from her unannounced encounter with the two of them. He admits Camreta was "posing difficult questions of S.G. in what was likely a confusing and uncomfortable situation." Brief Alford, 58. He gives an account of S.G.'s lengthy interview by Camreta in which for the first hour she denied any abuse. He discloses Camreta thereafter engaged in persistent

questioning of S.G. after she insisted that her father's touching "all over" was not "bad." Brief Alford, 59. Twice in his brief Alford refers to the child as "a frightened girl." *Id.* On the other hand, earlier in his brief he refers to their interview of S.G. as a "modest measure" to ferret out child abuse, *id.* 12, that the interview in S.G.'s case "resulted in only a minimal intrusion into her privacy interests." Regardless of where the parties stand, the Congressional finding that a sexual abuse investigation is not harmless should be sufficient response to any petitioner supporter that denies or discounts it.

2. Federal Law Recognizes The Importance Of Enforcing The Civil Rights Of The Family In A Child Abuse Investigation.

Congress has endorsed a more holistic and humane national child welfare policy than the government mission orientation of the petitioners. This is not a policy that sees this as a child allied with government on the one side and the parents on the other side. The very federal law petitioners cite most frequently, CAPTA, demands states protect the civil rights of the entire family in a child maltreatment investigation and that investigators treat the child well. Government actors who believe children have virtually no legal rights, who ignore the parents, who believe legal restrictions are a dangerous nuisance, and who mistreat a child in the initial interview, can

hardly argue they are following federal statutory requirements.

Congress made a finding that this is our national child welfare policy: "the child protection system should be comprehensive, child-centered, family-focused, and community based." This is accomplished in an environment that fosters "the health, safety, self-respect, and dignity of the child." 42 U.S.C. § 5101 (note) (2006), Pub. L. No. 102-295, tit. I, § 102(a)(7), 106 Stat. 188 (1992 CAPTA amendment).[12] In another CAPTA provision enacted in 2003 in the Keeping Children and Families Safe Act,[13] Congress affirmed that the child and family have legal rights worth protecting in an abuse investigation. A state cannot get CAPTA funding for its child protective services system unless it provides "training of representatives of the child protective services system regarding the legal duties of the representatives, which may consist of various methods of informing such representatives of such duties, in order to protect the legal rights and safety of children and families from the initial time of contact during investigation through treatment." 42 U.S.C. § 5106a(b)(2)(xix) (2006).

Petitioners would have to admit that Congress contemplated and expressly recognized that a child has "rights" during an abuse investigation when it decided to require investigators like petitioners to be

[12] "Safety" was added in a subsequent amendment.

[13] Pub. L. No. 108-36, § 114(b)(1)(A)(xix), 117 Stat. 810.

trained and notified of the existence of those rights. At a minimum these "legal rights" must include the Bill of Rights. Despite the clarity in which Congress articulated the notion that rights are to be afforded to the subjects of abuse investigations, petitioners are extremely dismissive of the constitutional rights of children, and ignore the rights of their parents. Ignoring the rights of children or their parents during abuse investigations is contrary to the national policy expressed by Congress. They address only the child's Fourth Amendment right to privacy, which in their view is virtually non-existent due to the child's age. Brief Alford, 50-53; Brief Camreta, Brief 11, 30-31. They make no mention of the child's familial right to have her family undisturbed by the government without proof. While Camreta focuses on avoiding parents, Alford is more intent on avoiding judges. Alford pointedly claims that probable cause and warrants just get in the way of their government mission of protecting children. Brief Alford, 46 (A warrant requirement would "frustrate the efforts of state officials to act quickly to protect the safety of children where abuse is suspected[.]"), 48 ("Imposing a requirement of probable cause would clearly frustrate the needs of government[.]"). In Deputy Alford's view, a state's adoption of the federal guideline for a rapid response to an abuse report precludes court orders in all cases. Brief Alford, 46, 62-63. But at least he is willing to submit to a reasonable suspicion standard for initiating a seizure of a child in order to interview her. *Id.*, 47-48. Camreta, on the other hand, says he is not constrained by *any* constitutionally based

standard. He invents a "reasonably credible evidence" standard, which has no legal precedent. Brief Camreta, 62-63. Although federal law recognizes that children and their families have some rights to protect them during CPS investigations, Camreta argues there are no legal restrictions on his work. Armed with nothing but a report to CPS, ("reasonably credible evidence"), he can seize a child and interview her just because he is investigating parental sexual abuse allegations. Brief Camreta, 12, 13-14, 34. His interpretation encompasses a per se approach to constitutional standards for conducting interviews: that his interviews with children are per se constitutional based on the subject matter alone. This proposition is a 180 degree turn from Congress's repeated recognition of "rights" during interviews. Such a per se rule opens the door to abusive tactics being used on those who have already suffered abuse.

Despite petitioners' arguments to the contrary, actual analysis of congressional policy reveals the legal positions and attitudes of the petitioners are not the national child welfare policy established by Congress. Instead of disregarding constitutional protections based on subject matter alone, national child welfare policy actually contemplates protections and safeguards by recognizing the "rights" of parties to child abuse investigations.

3. Congress Recommends That The Non-Offending Parent Be Included In The Investigation.

In Camreta's opinion the investigators can ignore parents to get access to their children because all parents are presumed unfit or uncooperative. Brief Camreta, 11 ("Seeking parental consent is simply not a safe or viable option."); 41 ("Seeking consent from either parent could be detrimental to the child."). By contrast, Congress recommends incorporating the non-offending parent into the investigation process because this helps the child and the justice system.

In the Victims of Child Abuse Act of 1990, 42 U.S.C. §§ 13001 to 13004 (2006), the participation of the non-offending parent, who is Mrs. Greene in this case,[14] is encouraged. This is based on a finding by Congress that at the investigation stage "too often the system does not pay sufficient attention to the needs and welfare of the child victim, aggravating the trauma that the child victim has already experienced." 42 U.S.C. § 13001(4) (2006). Another goal was to "increase the successful prosecution of child abuse offenders" by these child and family centered best practices. VOCA established discretionary grants for child advocacy centers, exclusively for physical and sexual abuse cases, and staffed by multi-disciplinary

---

[14] "The term 'non-offending family member' means a member of the family of a victim of child abuse other than a member who has been convicted or accused of committing an act of child abuse[.]" 42 U.S.C. § 13001a(8).

teams. 42 U.S.C. §§ 13001b, 13002. The initial interview of the child can be conducted by well-trained interviewers in a comfortable setting. 42 U.S.C. § 13002(b)(2). Counseling for abuse victims and their families is part of the services. 42 U.S.C. § 13001b(c)(2)(B)-(C). These centers must also "provide support for non-offending family members." 42 U.S.C. § 13001b(a)(2), (b)(2)(a)(i).

B. The Child Has No Legal Protector Besides A Parent Or A Judge During The Investigative Phase. The Child's Right To Counsel Commences Later With The Filing Of A Court Dependency Case.

One shortcoming of federal law has implications for evaluating the child's legal protection in a maltreatment investigation. Juveniles interviewed as possible victims do not have the same right to counsel that a juvenile suspect has. S.G.'s only legal protectors at the investigation stage are a parent or a judge. The child does not get a legal advocate until a dependency case is filed. In its original enactment CAPTA required states to provide a guardian ad litem (GAL) to the child in every child maltreatment court case. Pub. L. No. 93-247 § 4(b)(2)(G). This GAL is not even required to be an attorney. A later amendment added that the guardian ad litem "may be an attorney or a court appointed special advocate" (CASA). 42 U.S.C. § 5106a(b)(2)(A)(xiii). For unknown reasons, states are not fully complying with even this minimal representation by a person who may not be a legal

professional. Only about 16% of children get a court appointed representative like an attorney, GAL, or CASA volunteer.[15] There is no system in place to provide representation to the child at the investigative phase of a child protection case in order to stop or ameliorate the trauma of an investigation before the dependency court case is filed. Consequently, the implementation of protections and safeguards during the interview process is an essential component to an effective interview.

II. NO RESOLUTION ON THE CONSTITUTIONAL ISSUE CAN BE MADE BASED ON A FEW STATE LAWS ON CHILD INTERVIEWS. THE INVESTIGATION LAWS PROVE POLICE ARE USUALLY NOT WELCOME AT SCHOOL. STATE JUDGES ARE ALREADY OBLIGATED BY STATE LAW AND FEDERAL COURTS TO DECIDE REQUESTS FOR INVESTIGATION ORDERS. THEREFORE, THE JUDICIAL BURDEN OBJECTION FAILS.

This Court should not entertain the state law excuse in this case. A common defense by social workers and police in § 1983 cases is to claim their actions were authorized by state law. The lower federal courts have not given it any weight. *E.g., O'Donnell v.*

---

[15] *Child Maltreatment 2009*, 94 (U.S. Department of Health & Human Services), available on line at the Children's Bureau web site at www.childwelfare.gov. Only 32 states reported on this topic.

Brown, 335 F. Supp. 2d 787, 801-802 (W.D. Mich. 2004) ("State statutes and regulations cannot be construed to displace the protections of the Constitution – even when the statute acts to protect the welfare of children."); *Walsh v. Erie County Department of Job & Family Services*, 240 F. Supp. 2d 731, 751 (N.D. Ohio 2003) ("[T]he defendants contend that Ohio's statutory framework for learning about and investigating allegations of child abuse and neglect superseded their obligations under the Fourth Amendment . . . State statutes and regulations cannot displace the protections of the United States Constitution."). Neither should this Court. Legislatures have "no affirmative power to authorize States to violate" constitutional guarantees. *Saenz v. Roe*, 526 U.S. 489, 508 (1999).

A. State Child Abuse Investigation Laws Are Similar Due To Federal Funding Incentives. They Are Not Independent Policy Choices By States Supporting A Reasonableness Claim.

Much in the same way as they use federal law references, petitioners and their amici cite state CPS investigation laws as authorizations for their challenged investigation practices. It is true that prompt and joint investigation obligations are part of many state laws about investigation of child abuse and neglect reports. Most states also authorize agency investigators to interview a child at school about the abuse report. Accordingly, the Ninth Circuit properly considered these laws as evidence of entanglement

with criminal law enforcement, which triggers the Fourth Amendment warrant and probable cause procedures under *Ferguson v. City of Charleston*.[16] The petitioners' citations to many more police entanglement laws outside Oregon prove that this is a nationwide problem. Any other relevance of these laws on other Fourth Amendment is less clear.

Perhaps the petitioners are using these state investigation laws to demonstrate the reasonableness of their conduct. The implied constitutional relevance is that this volume of substantially similar state laws express independently considered policies that are reasonable, and as such they render state actor conduct pursuant to them constitutional under a Fourth Amendment reasonableness analysis. Actually, these state investigation laws are all about money – federal money. Under CAPTA, if the states fail to enact certain federal mandates, they lose massive amounts of federal funding for their child welfare programs. It follows then that the state investigation laws resemble each other because they came from the same source – federal law. The similarities shared by numerous state interviewing statutes is not mere coincidence or an expression of independent policy statements by state legislatures. Therefore, this Court should not afford any deference or evidentiary value to them.

---

[16] *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

The federal funding impetus underlies the entire child welfare system today. Until the enactment of CAPTA in 1974, child welfare law was mostly left to the states, like other types of family law. But significant parts of the foster care and adoption systems have become identical in most states – essentially federalized – through a series of federal statutes starting in 1980.[17] Along the way, Congress has been conducting hearings, making findings on the scope and response to child maltreatment, ordering studies of policies and practices, and making significant policy shifts based on this research. So for over three decades Congress has been the author and enforcer of remarkably uniform child welfare policy and practices for the states through its spending power. There are basically two types of funding: large statewide

---

[17] For example, there is the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 670 to 676 (2006). This was the law construed in *Suter v. Artist M.*, 503 U.S. 347 (1992). After *Suter*, Congress amended the statute substantially in the Adoption and Safe Families Act of 1997 (AFSA), Pub. L. No. 105-89. Other federal laws governing foster children, adoptions, and system improvements are:

Strengthening Abuse and Neglect Courts Act of 2000, Pub. L. No. 106-134, 114 Stat. 1266 (Oct. 17, 2000), 42 U.S.C. § 670 (2006);

Adoption Promotion Act of 2003, Pub. L. No. 108-145, 117 Stat. 1879, 42 U.S.C. § 673b (2006);

Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949, 42 U.S.C. § 1305 (Supp. 2009);

Child and Family Services Improvement Act of 2006, Pub. L. No. 190-288, 120 Stat. 1233, 42 U.S.C. § 621 *et seq.* (amending Social Security Act, tit. IV, part B).

block grants for federally compliant states and smaller discretionary grants for approved best practice programs. If a state wants federal funds for CPS, foster care, and adoptions, the state must replicate a federal model for case processing.[18] That is the same process as what this Court found when it reviewed the first major adoption law with this funding model in *Suter v. Artist M.*, 503 U.S. 347 (1992). Even before the Adoption Act, Congress was successful in using CAPTA funds to create mandatory reporting laws in all states with substantially similar provisions on investigating reports.

The Court cannot infer reasonableness, and therefore constitutionality, of the child's interview at school by citing state laws or administrative rules authorizing the investigation choices of the petitioners. Most states now have substantially the same practices because they have adopted the federal plan, which can require passing laws on investigation of child maltreatment reports.[19] The financial pay-offs to

---

[18] For an excellent explanation of the incentivized federal-state funding model for child welfare practices, see Miriam Rollin, Frank Vandervort & Ann M. Haralambie, *Federal Child Welfare Law and Policy: Understanding the Federal Law and Funding Process*, in *Child Welfare Law and Practice* 143-183 (Marvin Ventrell & Donald N. Duquette, eds., Bradford Publishing Co., 1st ed. 2005).

[19] "The funding incentives – hundreds of millions of dollars annually for larger states – are sufficient so that each state has determined it is in its interest to take the money. When a state avails itself of the federal financial support, it must comply with the requirements of the federal law." *Id.* at 144.

write federal "suggestions" into state law are huge. This means that loss or ineligibility for such pay-offs can be a crippling financial blow to each state's child welfare budget. "Every year, billions of federal, state and local dollars are used to finance child welfare services. In 2006, the cost for child welfare services nationwide was at least $25.7 billion. Almost half of that amount, $12.4 billion, was funded by the federal government." Zuzana Murarova & Elizabeth Thornton, *Federal Funding for Child Welfare: What You Should Know*, 29(3) ABA Child Law Practice 33 (2010), available at www.childlawyerpractice.org. To fund foster care costs, a state that adopts the federal mandates can be reimbursed 50% to 83% of what it spends. *Id.* at 38.

B. State Laws Must Yield To The Constitution.

The state investigation laws are irrelevant to the resolution of the constitutional issues in this case, except as used by the lower court to establish criminal law enforcement purposes of the joint investigation. State laws establishing abuse investigation procedures must yield to the Constitution, even when the law promotes child protective purposes. The case of *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001) illustrates this point. At issue was a state law restricting cigarette advertising around schools. The Court agreed that the law advanced an important public interest to curb underage smoking. Although this harm to children "poses perhaps the single most

significant threat to public health in the United States," the Court held that the First Amendment trumped this child-focused state law. *Id.* at 570. When the federal courts set the minimum constitutional standards in family matters "they are not diminished by the fact the state may have specified its own procedures that it may deem adequate for determining the pre-conditions to adverse action." *Santosky v. Kramer*, 455 U.S. 745, 755 (1982); see *Monroe v. Pape*, 365 U.S. 167, 183 (1960) ("It is no answer that the State has a law which if enforced would give relief.").

C. Most Interview Laws Do Not Support The Police Officer's Presence At A School Interview.

The amici does not advocate deciding this case on state law or policy. But if the Court considers that authority, it does not favor Deputy Alford. Most states have laws allowing representatives of the public child welfare agency ("the Department" or "CPS") to interview a child at school about suspected maltreatment. Far fewer state laws expressly allow a police investigator to do the same. Only seven states, including Oregon, authorize a law enforcement officer to interview a suspected child abuse victim at a school. Kan. Stat. Ann. § 38-226; Neb. Rev. Stat. § 28-713; N.H. Rev. Stat. Ann. § 169-C:38, IV (West 2002 & Supp. 2010); N.M. Stat. Ann. 1978 § 32-A-4-3; Ore. Rev. Stat. § 419b/045; S.C. Code 1976, § 63-7-380.

D. The Juvenile Judiciary Will Not Be Burdened By A Constitutional Obligation To Rule On Requests For Investigation Orders. This Is Already Part Of Their Duties.

The petitioners argue that a warrant requirement should not be adopted because it places a burden on the judiciary. That is a policy argument, not a legal argument. Petitioners' proposition equates to a presumption that imposing additional safeguards is always burdensome and is thus, improper. As this Court explained in *Stanley v. Illinois*, "Procedure by presumption is always cheaper and easier than individualized determination." *Stanley v. Illinois*, 405 U.S. 645, 655 (1972). When protections of children and their families are at issue, it is clear that presumptions are disfavored. Further, the specific policy debate asserted by petitioners ended when the Constitution was adopted. The Fourth Amendment "reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *United States v. Stevens*, ___ U.S. ___, 130 S. Ct. 1577, 1585 (2010); see *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) ("A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all.").

The juvenile judiciary will not be burdened by an obligation to rule on requests for interview orders. Keep in mind that in most cases the order would be unnecessary due to exigency, parental consent, the young age of the child, or sufficient other evidence.

In the few remaining cases where an order is required to secure a necessary child's interview, like a verbal child in a sexual abuse investigation, juvenile judges can do their job and rule on order requests from the agency or police. Many of them are already doing that with no constitutional command. By statutes in some states they are already tasked with deciding investigation disputes by orders, before the dependency case is filed in most instances.[20] At least fourteen states allow the court to issue investigation orders for agency access to the child.[21] For the most

---

[20] This is in addition to the routine rulings on protective custody or removal orders. As documented in other respondent amici briefs, *e.g.* Brief of CPS Watch, state law and federal circuit decisions require these orders. In that process, the juvenile judges are complying with the warrant and probable cause requirements imposed by the lower court in this case.

[21] *Alabama*: Ala. Code § 9.301(12) (2009) (best interest plus refusal); *H.R. v. Alabama Dep't of Human Resources*, 612 So.2d 477 (Ala. App. 1992) (probable cause read into statute).

Arkansas: Ark. Code Ann. § 12-12-510(b) (2009) (no standard).

Colorado: Colo. Rev. Stat. § 19-3-308(3)(b) (West 2005 & Supp. 2010) (good cause).

Delaware: 16 Del. Code Ann. § 910(a)(1)(3) (2003 & Supp. 2010) (need plus parent unavailable).

Florida: Fla. Stat. Ann. § 39.301(12) (West 2010) (best interest plus refusal).

Illinois: 325 Ill. Comp. Stat. 5/7.5 (West 2010) (best interest plus refusal).

Iowa: Iowa Code Ann. § 232.71B.5 (West 2010) (probable cause).

(Continued on following page)

part, the investigation access orders in state laws are issued with low to no legal standards, and far below probable cause (refusal or report only, best interest, good cause, reasonable suspicion). Only four of these statutes use the constitutional probable cause standard. But the probable cause standard is used in the 27 states where physical examination orders are constitutionally mandated by federal appeal courts.[22]

Kentucky: Ky. Rev. Stat. Ann. § 620/040(5)(a) (Lexis Nexis 2008) (probable cause plus refusal); 922 Ky. Adm. Regs. 1:330(3)(20).

Louisiana: La. Child Code 613(A) (2004) (reasonable suspicion plus refusal).

Minnesota: Minn. Stat. § 626.556(10)(e)-(f) (West 2011) (refusal).

New Hampshire: N.H. Rev. Stat. Ann. § 169-C:34(IV) (West 2002 & Supp. 2010) (child safety).

New York: N.Y. Fam. Ct. Act § 1034(2) (2009) (report plus refusal).

North Carolina: N.C. Gen. Stat. § 7B-303 (2003) (refusal) (2009).

Utah: Utah Code Ann. § 78A-6-106(1) (2003) ("investigative subpoenas" with warrant standard).

[22] *2d Circuit*: Connecticut, New York, Vermont

Tennenbaum v. Williams, 193 F.2d 582, 585 (2d Cir. 1999).

3d Circuit: Delaware, New Jersey, Pennsylvania

Good v. Dauphin County Social Services for Children & Youth, 891 F.2d 1087, 1093 (3d Cir. 1989).

5th Circuit: Louisiana, Mississippi, Texas

Roe v. Texas Dep't of Protective & Regulatory Services, 299 F.2d 395, 407-08 (5th Cir. 2002).

7th Circuit: Illinois, Indiana, Wisconsin

(Continued on following page)

There is no evidence that juvenile judges are uniquely incapable of applying the probable cause standard to investigation access orders, like the interview order that should have been sought in the case before S.G. was seized at school. Indeed, juvenile courts are already handling orders on protective custody, removals, physical exams in the majority of states, all of which use the probable cause standard. They can be the "neutral and detached magistrate" required by the Fourth Amendment to referee a dispute between the government and a child with constitutional rights. Consequently, the suggestion that additional safeguards impose an unworkable burden on the juvenile judiciary is unavailing.

Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986).

9th Circuit: Alaska, Arizona, California, Idaho, Hawaii, Montana, Nevada, Oregon, Washington

Wallis v. Spencer, 202 F.2d 1126, 1141 (9th Cir. 2000).

10th Circuit: Colorado, Kansas, Oklahoma, New Mexico, Utah, Wyoming

Dubbs v. Head Start, Inc., 335 F.3d 1194 (10th Cir. 2003).

There is one additional state, Alabama, where examination orders are required by state law, but on less than probable cause. Ala. Code § 26-14-7(c) ("cause" plus refusal).

III. ALL PARTICIPANTS IN THE CHILD WELFARE SYSTEM BENEFIT FROM A COURT DECISION THAT SUPPORTS A RELIABLE, HUMANE, AND LAWFUL CHILD INTERVIEW ABOUT ABUSE. QUESTIONABLE INTERVIEWING PRACTICES CREATE AMBIGUITY IN THE JUVENILE LEGAL SYSTEM THAT DOES NOT FURTHER ITS CHILD PROTECTION MISSION.

The *Lidster* balancing test promoted by the petitioners includes evaluation of the degree to which the interview seizure advances the public interest. *Illinois v. Lidster*, 540 U.S. 419, 427 (2004). The petitioners have correctly argued that child protection in civil and criminal courts is an important and constitutional public purpose. *Prince v. Massachusetts*, 321 U.S. 158 (1944). An individual juvenile dependency case can be undermined when it lacks sufficient reliable evidence to make good decisions for a child's welfare. Unprovable maltreatment is just as damaging to the child as undetected maltreatment.[23] But an unjustified accusation of an innocent parent also harms the child. "In either case, the failure to obtain competent and reliable evidence of child sexual assault has a profound impact on the victim."

---

[23] The latter is the only harm touted by the petitioners justifying their request for unregulated access to children. Their argument falls short. Detection, without proof, will not save a child. Only a civil or criminal court can legally separate a child from an unfit home or an unfit parent. To do that, the court needs reliable evidence.

Timothy L. Arcaro, *Child Victims of Sexual Abuse and the Law,* 12(3) Mich. Child Welfare L.J. 2, 5 (2009). Inappropriate child interviewing techniques "may significantly impact certain aspects of the child's account," which in turn affects "the reliability of the statements" and "may seriously compromise subsequent legal proceedings." *Id.*

The important public purpose of child protection is served only by humane, reliable, and lawful interviews of suspected child abuse and neglect victims.[24] This principle benefits all parties to the civil dependency case. Truth seeking and reliability of the juvenile court's decisions are undermined by questionable child interviewing practices. Civil child protection by state intervention is based on past harm or future danger. Those determinations must be based on evidence, not speculation or suspicion. Clearly, there is an adverse impact on the fact-finding process in a dependency case when the juvenile court must contend with an unreliable and unrecorded child statement. In this case the lack of reliability was exacerbated where the interview involved a child who did not report abuse before the interview and where the allegation was secured in an ambush of a

---

[24] It may be surprising to this Court, but in most dependency cases a child is not interviewed during the initial investigation. The child may be too young, traumatized, or uninformed. Often the child's input is not necessary because a parent admits or there is other reliable and sufficient evidence to prove the case, like adult witnesses who encounter an abusive or neglectful situation.

special education elementary student at school by two strange men, one an armed uniformed police officer, and the other one badgering the student until her denials turned into accusations of "sexual abuse" against her father.[25]

Even without the child's later recantation,[26] the abuse allegation would be difficult to sustain. With the recantation, the juvenile court is left with ambiguous and unknowable facts. The lack of a recording of the interview presents an inexcusable and preventable credibility problem for the juvenile court. A recording requirement is one best practice on which all child forensic interview experts agree.[27] The only witness to Camreta's interrogation of S.G. was Deputy Alford, a local colleague of the other police agency in a small town that had arrested her father for molesting another child. Alford admits he had a tape recorder in his car, but he did not use it and he took no notes. The failure of the two investigating officers to record a child's initial interview about abuse "in a controlled situation and absent exigent circumstances, will be viewed with distrust in the

---

[25] "Sexual abuse" is what the petitioners call it. It is difficult to ascribe that label to an allegation of touching the genital area through clothing by a sleeping father, in the absence of other evidence showing sexual intent. *Child Victims of Sexual Abuse and the Law, supra* at 3-4.

[26] See note 29 *infra*.

[27] Hollida Wakefield, "Guidelines in Investigatory Interviewing of Children: What is the Consensus in the Scientific Community?" 24(3) Amer. J. Forensic Psychol. 57 (2006).

judicial assessment of the veracity of the child victims' statements." *State v. Weaver*, 964 P. 2d 713, 723 (Mont. 1998). This ambiguity and lack of reliability can lead to over-protection of a safe child or under-protection of a maltreated child, depending on which direction the doubts lead a particular judge. The bottom line is that all parties to a child welfare case are better served by a ruling from this Court that supports reliable, humane, and lawful child interviews.

While the damage to the dependency case for an unreliable child interview may not occur in all cases, its correlation to the most serious cases magnifies the harm from practices like those used on S.G. Although most of the policy advocacy of the petitioners and their amici is about child abuse, abuse cases are not the bulk of the juvenile docket. Child abuse is by far the smallest part of the dependency court case load. Child neglect comprises at least 90% of the cases reported to CPS, substantiated, and filed in court. When the more infrequent sexual abuse case is filed, amicus agrees with petitioners that the child's statement may be the sole or primary basis for making all the court decisions, including ordering a temporary to permanent break-up of the child's family.[28] The fact that the child's statement is essential in some of these most serious cases is, by far, the most compelling

---

[28] There is usually no medical evidence to corroborate or rule out the sexual abuse, even if there was penetration. Vincent J. Palusci, *Identifying and Reporting Child Abuse and Neglect*, 10(3) Mich. Child Welfare L.J. 17, 21-22 (2007).

reason for investigators to take care to get it right – both factually and legally. Judicial involvement could help, too, in order to provide parameters to improve reliability of the important first child interview. For example, these parameters might include securing a skilled interviewer or conducting the interview in a humane and comfortable setting for the child. It is interesting that the petitioners want to cooperate with each other in an investigation, but they are not interested in cooperating with the juvenile court judge, who is in the best position to help them get the truth.

The facts of this case reveal just how severely a dependency case is impacted by faulty and unreliable interviews of suspected child abuse victims. Petitioners' investigative methods did not work for them in this case. They were able to conduct this investigation without the legal restrictions they oppose in this Court. Yet all the harms they claim will happen if the Fourth Amendment legal requirements are strictly applied occurred anyway – child recantation,[29]

---

[29] The school interview of S.G. happened on February 24, 2003. The record is not clear on the exact date she first told her mother that she had lied about her father abusing her. It had to have been sometime between February 24 and March 11, 2003, before the two girls were put in foster care, because little sister K.G. overheard her sister confessing to their mother that she lied to Camreta. *Greene v. Camreta*, 2006 WL 75847 *2 (D. Ore. Mar. 23, 2006). When K.G. was interviewed at the assessment center on March 20, she reported the recant conversation. When S.G. came to the center on March 31, she also told the "lady" who did the physical exam that her father had not abused her. *Greene v. Camreta*, 588 F.3d 1011, 1019 (9th Cir. 2009);

(Continued on following page)

ambiguous and inadequate evidence, "burdening" the juvenile court with more hearings and orders, loss of dependency court protection, and an unsuccessful prosecution. By using parental consent or a court interview order to create optimal conditions for the child, the parent or the dependency court judge could have given the state and the child's family the best chance for getting to the truth. Instead, this flawed CPS and police investigation left the juvenile court with so much ambiguity that it had to release S.G. and her sister from protective custody and dismiss the case. When the criminal case against the father about molesting S.G. went to trial, it resulted in no conviction on the charges about S.G.[30]

An interview where a child is badgered into accusing a parent of abuse, and then immediately recants, yields unreliable evidence. Such evidence does not support the important child protection decisions

---

Depos. S.G. 137-139 at Dist. Ct. Doc. 53, Ex. C. So the record shows that S.G. did not recant in order to go home, as the assessment center surmised. *Camreta v. Green,* at 1019-20 (quoting KIDS Center report: "[T]here appears to be a high likelihood that S.G. may have recanted her statements about her father touching her privates in an attempt to expedite her return home."). She was still living at home when she denied the abuse the first time.

[30] Two weeks after S.G.'s school interview, the grand jury indicted her father on multiple counts of felony sexual abuse against her and F.S., the five-year-old son of a family friend. *Greene v. Camreta,* 2006 WL 758547 *2 (D. Ore. Mar. 23, 2006). The jury could not reach a verdict. The case was plea bargained for a conviction on the boy, and a dismissal on his daughter. *Greene v. Camreta,* 588 F.3d 1011, 1020 (9th Cir. 2009).

of the juvenile court. It could result in a "hung" judge, just like the hung jury in Mr. Greene's criminal trial. Where the ultimate safety of a child hangs in the balance, it is of utmost importance to the child protection bench and bar that interviewing practices and procedures yield reliable results that aid in securing the best possible outcomes of protection and permanency for all children.

CONCLUSION

The attorneys who represent, advocate, negotiate, and fight their way through child protection cases all share this knowledge: good intentions do not always render good results. Normally, such a proposition is of little consequence but, in the context of protecting children from the ravages of child abuse, bad results could mean physical and emotional trauma, continued abuse, and sadly, even death of a child. In that regard, professionals who work on child welfare cases need the best tools possible, along with good intentions, if they are to achieve good results.

This case presents frightening components that could cripple the probability of good results (protecting children), including the suggestion that procedural safeguards are not necessary for protection of a child or the child's family during an interview of a suspected abuse victim so long as the subject matter alone shocks the conscience of the investigator. Yet, free reign and unchecked authority of investigators failed in this case because those tactics yielded

unreliable results. Consequently, if free reign is the rule, it will fail again.

National policy on child welfare and current practices reveal that the best results, protection of children, are obtained when child interviews are humane, reliable, and lawful. That involves implementing safeguards before and during a child interview. Safeguards are not additional burdens to the judiciary, they are additional tools for the child welfare bench and bar. The Children's Law Section of the State Bar of Michigan would ask this Court to consider that the burden of prosecuting, defending, and presiding over cases where critical evidence is obtained through unreliable means is far greater in scope and complexity than the burden of implementing additional safeguards that are more likely to result in reliable evidence. Ultimately, we all share the good intentions of protecting children with varying ideas of how to exercise that intent. In the end the child welfare law, policy, data, and current practice reveal that the best way to do so is to exercise that intent while recognizing the rights of children and their families during the investigative phase of child welfare cases.

Respectfully submitted,

ELIZABETH S. WARNER*
2464 Spring Arbor Rd.
Jackson, MI 49203
(517) 787-3560
eswarner@aol.com
*Counsel of Record

JODI M. LATUSZEK
SPEAKER LAW FIRM PLLC
230 N. Sycamore St.
Lansing, MI 48933
(517) 482-8936
jlatuszek@speakerlaw.com

Nos. 09-1454 and 09-1478

FILED
DEC 16 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G, a minor, and K.G., a minor,

Respondent.

JAMES ALFORD,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE COOK COUNTY PUBLIC GUARDIAN AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY AND SUGGESTING REVERSAL

ROBERT F. HARRIS
COOK COUNTY PUBLIC GUARDIAN
CHARLES PEREZ GOLBERT
KASS A. PLAIN*
MARY BRIGID HAYES
CAROL CASEY
DANIELLE GOMEZ
SUSAN S. WIGODA
NICHOLAS YOUNGBLOOD
Assistant Public Guardians
2245 West Ogden, Fourth Floor
Chicago, Illinois 60612
(312) 433-4300
kass.plain@cookcountyil.gov
Counsel for Amicus Curiae

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

459 1
(42)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICUS CURIAE* 1

INTRODUCTION 1

THE CHILDREN'S STORIES 2

INTEREST OF THE *AMICUS* 6

SUMMARY OF THE ARGUMENT 7

ARGUMENT 9

I. A PARENT HAS A LIBERTY INTEREST IN HER RELATIONSHIP WITH HER CHILD, BUT THE PARENT ALSO HAS CORRESPONDING DUTIES OF CARE; AND THE STATE HAS THE RIGHT TO IMPLEMENT A CHILD PROTECTION SYSTEM TO INVESTIGATE WHETHER A CHILD CAN SAFELY REMAIN WITH THE PARENT, AND THE CHILD HAS INDEPENDENT RIGHTS TO SAFETY AND TO COMMUNICATE ABOUT HIS SAFETY 9

II. THE REASONABLENESS ANALYSIS ARTICULATED IN *NEW JERSEY V. T.L.O.* AND *ILLINOIS V. LIDSTER* SHOULD APPLY IN CHILD PROTECTION INVESTIGATIONS 14

A. The Reasonableness Analysis 14

TABLE OF CONTENTS – Continued

Page

B. Requiring a Warrant, Exigent Circumstances, or Parental Consent for State Authorities to Interview a Suspected Child Abuse Victim is Too Restrictive of the Government's Compelling Goal to Protect its Child Citizens 17

III. SOCIAL SCIENCE RESEARCH SHOWS THAT ADHERING TO BEST PRACTICES INCREASES THE ACCURACY OF CHILD ABUSE INVESTIGATIONS, DECREASES THE TRAUMA SUFFERED BY CHILD ABUSE VICTIMS, AND SERVES THE STATE'S COMPELLING INTEREST TO REDUCE THE LONG-TERM NEGATIVE IMPACT CHILD ABUSE HAS ON SOCIETY 23

CONCLUSION 32

TABLE OF AUTHORITIES

Page

CASES

Artiaga v. Money, 2006 U.S. Dist. LEXIS 46935 (N.D. Ohio, Jul. 11, 2006) 28

In re Burrus, 136 U.S. 586 (1890) 13

Calabretta v. Floyd, 189 F.3d 808 (9th Cir. 1999) 19

California v. Acevedo, 500 U.S. 565 (1991) 12

Darryl H. v. Coler, 801 F.2d 893 (7th Cir. 1986) 16, 21

Deshaney v. Winnebago Co. Dep't of Soc. Servs., 489 U.S. 189 (1989) 20

Doe v. Bagan, 41 F.3d 571 (10th Cir. 1994) 16

Ferguson v. City of Charleston, 532 U.S. 67 (2001) 18

Gates v. Texas Dept. of Protective and Regulatory Servs., 537 F.3d 404 (5th Cir. 2008) 10

Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009) ..... *passim*

Hodge v. Jones, 31 F.3d 157 (4th Cir. 1994) 11

Illinois v. Lidster, 540 U.S. 419 (2004) ..... *passim*

K.D. v. County of Crow Wing, 434 F.3d 1051 (8th Cir. 2006) 11

Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981) 12

Manzano v. South Dakota, 60 F.3d 505 (8th Cir. 1995) 11

TABLE OF AUTHORITIES – Continued

Page

Myatt v. Hannigan, 910 F.2d 680 (10th Cir. 1990) 28

New Jersey v. T.L.O., 469 U.S. 325 (1985) ..... *passim*

Pennsylvania v. Ritchie, 480 U.S. 39 (1987) 19

Printz v. U.S., 521 U.S. 898 (1997) 13

Santosky v. Kramer, 455 U.S. 745 (1982) 9, 12

Tenenbaum v. Williams, 193 F.3d 581 (2d Cir. 1999) 20

Terry v. Ohio, 392 U.S. 1 (1968) 14

Terry v. Richardson, 346 F.3d 781 (7th Cir. 2003) 11

Troxel v. Granville, 530 U.S. 57 (2000) 9

United States v. Hollingsworth, 495 F.3d 795 (7th Cir. 2007) 10

United States v. Morrison, 529 U.S. 598 (2000) 13

United States v. Provost, 969 F.2d 617 (8th Cir. 1992) 28

Walker v. Orem, 451 F.3d 1139 (10th Cir. 2006) 14

Wildauer v. Frederick Co., 993 F.2d 369 (4th Cir. 1993) 17

STATUTES

325 Ill. Comp. Stat. 5/1 *et seq.* 13

705 Ill. Comp. Stat. 405/1-8 2

89 Ill. Admin. Code 300 *et seq.* 27

TABLE OF AUTHORITIES – Continued

Page

PROCEDURES

DCFS Procedure Section 300 (2009).....13

DCFS Procedure Section 300.50(c)(8) (2009) 26

DCFS Procedure Section 300.60(m)(4) (2009).....26

DCFS Procedure Section 300.70(b)(6)(13)(ii) (2009)....29

DCFS Procedure 300, Appendix H, V(a) (2004) 27

OTHER AUTHORITIES

American Academy of Child & Adolescent Psychiatry, *Guidelines for the Clinical Evaluation for Child and Adolescent Sexual Abuse* (1988).....25

American Prosecutors Research Institute, *Investigation and Prosecution of Child Abuse*, Sage Publications (3d ed. 2004).....28

Rebecca M. Bolen, *Child Sexual Abuse: Its Scope and our Failure*, Kluwer Academic/ Plenum Publishers (2001) 16

Elaine R. Cacciola, *The Admissibility of Expert Testimony in Intrafamily Child Sexual Abuse Cases*, 34 U.C.L.A. L.REV. 175 (1986) 29

Theodore P. Cross, Wendy A. Walsh, Monique Simone, and Lisa M. Jones, *Prosecution of Child Abuse: A Meta-Analysis of Rates of Criminal Justice Decisions*, 4 Trauma, Violence & Abuse 323 (2003).....16

TABLE OF AUTHORITIES – Continued

Page

Jacinthe Dion and Mireille Cry, *The use of the NICHD protocol to enhance the quantity of details obtained from children with low verbal abilities in investigative interviews: A pilot study*, 17 Journal of Child Sexual Abuse (Issue 2) 144 (2008).....27

Robert F. Harris, *A Response to the Recommendations of the UNLV Conference: Another Look at the Attorney/Guardian Ad Litem Model*, 6 NEV. L.J. (Issue 3) 1284 (2006).....1

Nancy Kellogg, MD and the Committee on Child Abuse and Neglect, *The Evaluation of Sexual Abuse in Children*, 116 Pediatrics (Issue 2) 506 (2005).....24

Michael E. Lamb, Irit Hershkowitz, Yael Orbach, and Phillip W. Esplin, *Tell Me What Happened: Structured Investigative Interviews of Child Victims and Witnesses*, Wiley-Blackwell (2008).....28

Michael E. Lamb, Yael Orbach, Irit Hershkowitz, and Phillip W. Esplin, *Structured forensic interview protocols improve the quality and informativeness of investigative interviews with children: A review of research using NICHD Investigative Interview Protocol*, 31 Child Abuse and Neglect (Issues 11-12) 1201 (2007).....23, 27, 28

TABLE OF AUTHORITIES – Continued

Page

Kamala London, Maggie Bruck, and Stephen J. Ceci, *Disclosure of Child Sexual Abuse: What Does Research Tell Us About the Ways That Children Tell?*, 11 Psychology, Public Policy, and Law (Issue 1) 194 (2005).....24

Donna Pence and Charles Wilson, *The Role of Law Enforcement in the Response to Child Abuse and Neglect*, U.S. Department of Health and Human Services (1992).....26, 27

Tom Plach, *Investigating Allegations of Child and Adolescent Sexual Abuse: An Overview for Professionals*, Thomas Books (2008).....25, 26

Debra A. Poole and Michael E. Lamb, *Investigative Interviews of Children: A Guide for the Helping Professional*, American Psychological Association (1998).....25, 27

Kate M. Scott, Don R. Smith, and Pete M. Ellis, *Prospectively Ascertained Child Maltreatment and Its Association With DSM-IV Mental Disorders in Young Adults*, 67 Archives of General Psychiatry (Issue 7) 712 (2010).....32

Cathy Spatz Widom, Kimberly DuMont, and Sally J. Czaja, *A Prospective Investigation of Major Depressive Disorder and Comorbidity in Abused and Neglected Children Grown Up*, 64 Archives of General Psychiatry (Issue 1) 49 (2007).....32

TABLE OF AUTHORITIES – Continued

Page

Hollida Wakefield, *Guidelines on Investigatory Interviewing of Children: What is the Consensus in the Scientific Community?*, 24 American Journal of Forensic Psychology (Issue 3) 57 (2006).....26

INTEREST OF THE *AMICUS CURIAE*[1]

INTRODUCTION

Cook County Public Guardian Robert F. Harris serves as attorney and guardian *ad litem* for more than six thousand abused, neglected, and dependent children in the Circuit Court of Cook County, Illinois, Child Protection Division. In the past 23 years, the Office of the Cook County Public Guardian has represented tens of thousands of children in abuse and neglect proceedings, as well as thousands of other children in divorce and child custody cases. *See* Robert F. Harris, *A Response to the Recommendations of the UNLV Conference: Another Look at the Attorney/Guardian Ad Litem Model*, 6 NEV. L.J., (Issue 3) 1284, 1284 n.1 (2006).[2] In addition, the Office of the Cook County Public Guardian has occasionally represented children as next friend in Section 1983 actions against officials of the Illinois Department of Children and Family Services (DCFS). Mr. Harris has almost two decades' experience working as an attorney and guardian *ad litem* on behalf of children in child protection cases. His staff currently numbers 270, including 143 attorneys. Mr. Harris respectfully

---

[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.6, this brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *Amicus Curiae* and his counsel made a monetary contribution to this brief's preparation or submission.

[2] For information on the Cook County Public Guardian, and the additional functions of his office, *see* www.publicguardian.org.

submits this *Amicus Curiae* brief, which is not submitted on behalf of either party to this litigation, because he believes that the law articulated by the Ninth Circuit is incorrect and will unnecessarily impede child abuse investigations, thereby putting countless children across the country at greater risk of child abuse.

In the present case, the Public Guardian, based on his many years' service as attorney and guardian *ad litem* for thousands of abused and neglected children, seeks to present in this brief the important perspective of the children who will be affected by this Court's review of the Ninth Circuit's ruling. Because the "Interest of the Public Guardian" is based on his role and experience as attorney and guardian *ad litem* for abused children, he respectfully offers a brief account of the initial reports of abuse relating to his child clients in four families.[3]

THE CHILDREN'S STORIES

Lisa

Nine-year-old Lisa wrote in her diary that her father had been sexually abusing her and her five-year-old sister Sara. Lisa's friend read Lisa's diary and told her mother, who reported these facts to

---

[3] The children described in this *Amicus* brief, real children in real child protection cases, have a right to confidentiality under Illinois law, 705 Ill. Comp. Stat. 405/1-8, so this *Amicus* brief alters their names, but not the facts.

Lisa's school. A school employee spoke with Lisa, who initially said that she was not allowed to talk about it, but then stated that her father had been sexually abusing her, and that her mother knows about it. At Lisa's home, a child protection investigator interviewed Lisa's mother. Lisa's mother acknowledged that Lisa had told her about the sexual abuse, that Lisa's father had confirmed the facts of the abuse to the mother, and that Lisa's father had promised at a family meeting that he would not do it again. During a subsequent victim sensitive interview (VSI) Lisa detailed years of sexual abuse. Lisa recounted that her father had vaginally penetrated her, forced her to perform oral sex, and masturbated in front of her. According to Lisa, her mother said that she and the children could not leave Lisa's father because he provided the money for the family, and that if Lisa did not want her father to abuse her, then she should not let him do it. Lisa's father confessed to the police, and said that he had told his wife that she should keep the girls away from him. Criminal cases remain pending against both parents. The child protection court placed Lisa and her sister in DCFS custody, and the children live with a foster parent who wants to adopt them.

Destiny and Jamal

Fourteen-year-old Destiny called the 911 emergency number after enduring whippings with extension cords, ironing cords, and belts over the course of six years. She had just been whipped and feared that

her mother would kill her. Police responded to find that the bodies of Destiny and three of her five siblings were all covered with marks made by extension cords. When interviewed at a hospital, Destiny's fifteen-year-old brother Jamal explained to a child protection investigator that although a child protection investigator came to the home just one week before Destiny's 911 call, the parents remained in the room while the investigator spoke with the children and that Jamal did not disclose the abuse at that time because he feared retaliation. In their parents' presence, the children denied abuse. At the hospital, the four older children reported that their parents forced the children to hold down their siblings during the whippings. The treating physician reported that the children had been whipped so often over six years that they were too afraid to report the whippings when investigators came to the home.

Michelle

Thirteen-year-old Michelle told two friends at school that her father had sexually assaulted her several months earlier, and that she feared he had impregnated her. The friends told a school counselor, who notified the child protection hotline. When a child protection investigator interviewed Michelle at school, she reported that her father had forcibly penetrated her vagina with his penis, and that she had told her mother, who declined to take any action. Concerned that the mother failed to protect her daughter, despite having known about the abuse, the

child protection investigator arranged to have a detective take Michelle for a VSI, where Michelle detailed two incidents of fondling, and repeated her account of the sexual assault. Michelle's father admitted that he had fondled and sexually assaulted Michelle when he was drunk. Michelle's mother admitted that she knew about the sexual abuse and failed to take any steps to protect her daughter. Michelle's father pleaded guilty to aggravated criminal sexual assault. Michelle lives with her maternal aunt and is doing well.

Angelica and Isaiah

The child protection hotline received a report that nine-year-old Angelica's father had beaten Angelica's mother six months earlier, and had recently shaved Angelica's head and forced her to stand outside to humiliate her. A child protection investigator went to the home and spoke to the parents. The parents admitted using corporal punishment, offered an innocuous explanation for shaving Angelica, and denied physical abuse. The parents allowed the investigator to talk with Angelica and her siblings, but only in the parents' presence. With their parents in the room, five-year-old Isaiah and Angelica denied being abused. The investigator observed marks on Angelica's eye and elbow. Angelica reported that she herself had caused the injuries. The following day Angelica visited her grandmother, who took Angelica to a doctor after noticing bleeding marks. The doctor found multiple bleeding and healing marks on

Angelica's chest, arms, torso, and backside. Away from her parents, Angelica reported that her parents had whipped her, and that her father had hit her two sisters with his hand, whipped Isaiah with a belt, and forced Isaiah to hit Angelica with an extension cord. Thereafter, both parents admitted whipping Angelica. Both parents face criminal charges. The child protection court placed the children in DCFS custody, and the children reside with a grandmother.

INTEREST OF THE *AMICUS*

Because no attorney represents the unique perspective of the children in this case, let alone the thousands of children across the country who will be affected by the Court's ruling, and because the Public Guardian believes that it is important for this Court to have the benefit of that perspective, the Public Guardian respectfully submits this brief, which will discuss the importance of a child's individual right to safety, as well as the critically important role that a child's opportunity to speak candidly about her safety concerns with school officials, child abuse investigators, and police officers plays in the practical protection of the child's right to safety. If the Ninth Circuit's reasoning were to be adopted by this Court, the safety of countless children nationwide will be made less secure.

The Public Guardian submits this brief in support of neither party, asking that this Court reverse the Ninth Circuit's opinion and instruct courts to apply

the reasonableness test of *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), and *Illinois v. Lidster*, 540 U.S. 419 (2004), when analyzing Fourth Amendment claims in child protection cases. This test represents an appropriate balance between parents' rights, the child's rights to safety, and the legitimate, indeed fundamental, state interests in protecting some of the most vulnerable members of our society from abuse and neglect and correctly identifying those children who cannot safely remain at home.

SUMMARY OF THE ARGUMENT

When the state investigates concerns about a child's safety, the child has an independent right to be safe and free from abuse, and to communicate about her safety. Although parents have a liberty interest in the care and control of their children, the right is not absolute, and parents have no constitutional right to be free from child abuse investigations.

In *Greene v. Camreta*, the Ninth Circuit held that an interview with a possible child abuse victim at her school constituted a seizure and violated the child's Fourth Amendment rights because the interview was conducted without a warrant, court order, parental consent, or exigent circumstances. Camreta did not contest the District Court's holding that the two hour interview of S.G. was a seizure. *Greene v. Camreta*, 588 F.3d 1011, 1022 (9th Cir. 2009). However, the Public Guardian suggests that not all interviews of possible child abuse victims by either a

child protection investigator or police officer constitute a seizure. Moreover, in its ruling, the Ninth Circuit ignored the long line of cases that held that only unreasonable searches and seizures are unconstitutional. This Court should rule that the reasonableness standard set forth in *New Jersey v. T.L.O.* and *Illinois v. Lidster* applies to child protection investigations. In such investigations, the state has a grave concern in ascertaining whether the child is abused and needs protection from her parents, or can safely remain home. Further, a well-conducted interview of the child advances the state's compelling interest in protecting children from abuse. Moreover, an interview at school does not severely interfere with the child's individual liberty. The states' use of best practices when interviewing children can greatly increase the accuracy of child protection investigations and decrease the trauma suffered by a child abuse victim. Furthermore, courts can use best practices as a guide when deciding whether a seizure during a child abuse investigation is reasonable.

ARGUMENT

I. A PARENT HAS A LIBERTY INTEREST IN HER RELATIONSHIP WITH HER CHILD, BUT THE PARENT ALSO HAS CORRESPONDING DUTIES OF CARE; AND THE STATE HAS THE RIGHT TO IMPLEMENT A CHILD PROTECTION SYSTEM TO INVESTIGATE WHETHER A CHILD CAN SAFELY REMAIN WITH THE PARENT, AND THE CHILD HAS INDEPENDENT RIGHTS TO SAFETY AND TO COMMUNICATE ABOUT HIS SAFETY.

Parents have a fundamental liberty interest in the care, custody and management of their children under the Fourteenth Amendment. *Santosky v. Kramer,* 455 U.S. 745, 753 (1982). The Court's recognition of this constitutionally-protected liberty interest reflects the law's understanding that parents ordinarily act in the best interests of their children, and that the state ought not ordinarily interject itself into that fiduciary relationship. "So long as a parent adequately cares for his or her child (i.e. is fit) there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." *Troxel v. Granville,* 530 U.S. 57, 68-9 (2000).

Once an allegation of abuse is made, however, there is reason to believe that the rights of the parents and the rights of the child may not always be

perfectly congruent. If proved, an allegation of abuse will constitute a violation of that fiduciary duty which the law presumes, and upon which the health and decency of society depends. Thus, "seizing" a child who might be the victim of abuse "presents a different Fourth Amendment dynamic" than seizing a chattel or a criminal suspect. *See Gates v. Texas Dept. of Protective and Regulatory Servs.*, 537 F.3d 404, 427-8 (5th Cir. 2008). In a child protection investigation, the child's rights may align with the government's interest in protecting children. *Id.* at 428. In Lisa's case, it was established that her father sexually abused her and that her mother was more concerned about maintaining the father's financial support than in protecting Lisa's right to bodily integrity and emotional well-being. In that case, Lisa's rights were more aligned with the government than with those of her parents. *See supra* at 2-3. Similarly, Michelle's rights were not aligned with those of her father, who sexually assaulted her, or with those of her mother, who knew of the abuse but failed to protect her. *See supra* at 4-5. In those cases, the parents should have no constitutional right to thwart a child protection investigation. *See United States v. Hollingsworth,* 495 F.3d 795, 802 (7th Cir. 2007) (the government had a compelling interest in speaking with a nine-year-old child based on suspicions that a parent was engaged in drug-dealing, speaking to the child at school was minimally intrusive, and violated no constitutional right of the parent).

At the outset of a child protection investigation, questioning the child does not violate any constitutionally protected liberty interest of the parent. The liberty interest that parents have with respect to the care, custody, and management of their child is a core value of our society, and the law supposes that it is one of mutual benefit. It is a liberty interest, rather than a property interest, and it presumes the existence of a relationship that exists for the beneficial development of children. Above all, the parents' liberty interest is not absolute. *Manzano v. South Dakota,* 60 F.3d 505, 510 (8th Cir. 1995). The compelling government interest in protecting children, particularly when protection is considered necessary against the parents themselves, necessarily limits the parents' liberty interest in control of their children. *K.D. v. County of Crow Wing,* 434 F.3d 1051, 1055 (8th Cir. 2006). Moreover, the right to family integrity does not include a constitutional right to be free from abuse investigations. *Hodge v. Jones,* 31 F.3d 157, 164 (4th Cir. 1994). During child abuse investigations, arbitrary abuses of government power are checked by requiring an objective justification for the steps taken during the investigation. *Terry v. Richardson,* 346 F.3d 781, 787 (7th Cir. 2003).

While every parent and child has a right to be free from "seizure," not every contact is a "seizure," and not every "seizure" is impermissible. First, not every contact with a child during a child protection investigation necessarily should be categorized as a "seizure." For example, Destiny dialed 911 after

enduring years of whippings by her mother; the contact she initiated with the police cannot reasonably be considered a seizure. *See supra* at 3-4. A court could only consider Destiny's contact as a seizure if it accepted the idea that a parent has an absolute property interest in a child, as if the child were chattel. The ability of the state to safeguard children has never been crippled by such a dubious constitutional principle and never should be.

Moreover, even if such contacts should be considered "seizures," they would not be impermissible in these circumstances. What must be recognized is that children themselves have an interest in their own safety, and thus, in truth-seeking, separate and apart from their parents, when state officials are called upon to investigate child abuse complaints. Thus, even if a child were properly to be considered "seized" during questioning aimed only at protecting her safety, the Fourth Amendment does not require a prior warrant for searches and seizures. *See California v. Acevedo,* 500 U.S. 565, 581 (1991) (Scalia, J., concurring). Rather, the Fourth Amendment only prohibits searches and seizures that are "unreasonable." *Id.*

The states, as *parens patriae*, have a strong interest in the welfare of children, including protecting children from and preventing child abuse. *Santosky v. Kramer*, 455 U.S. at 766; *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981). To further this compelling interest, Illinois, like most states, has comprehensive laws and regulations governing the

investigation of child abuse. *See* 325 Ill. Comp. Stat. 5/1 *et seq.*; 89 Ill. Admin. Code 300 *et seq.*; DCFS Procedure Section 300 (2009), accessible at http://dcfswebresource.dcfs.illinois.gov. In our constitutional system of dual sovereignty, where the powers not delegated to the federal government by the Constitution nor prohibited by it to the states are reserved to the states (U.S. Const. Amend X; *Printz v. U.S.*, 521 U.S. 898, 918-9 (1997)), notions of federalism demand that the states be allowed to develop their child protection mechanisms without interference unless such mechanisms are clearly inconsistent with constitutional requirements. This is especially true for an area that has historically been of state, and not federal domain. *In re Burrus*, 136 U.S. 586, 593-4 (1890) (the subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not the laws of the United States); *United States v. Morrison*, 529 U.S. 598, 617-8 (2000) (regulation and punishment of violence, even interstate violence, that is not directed at goods involved in interstate commerce has always been the province of the states). States are in the best position to study and implement child protection systems that are consistent with best practices as developed by social scientists and researchers. *See infra* at 23-30, best practices. Unless clearly violative of constitutional norms, these systems should be entitled to substantial deference.

II. THE REASONABLENESS ANALYSIS ARTICULATED IN *NEW JERSEY V. T.L.O.* AND *ILLINOIS V. LIDSTER* SHOULD APPLY IN CHILD PROTECTION INVESTIGATIONS.

A. The Reasonableness Analysis.

This Court should apply the reasonableness standard set forth in *New Jersey v. T.L.O.* to child protection investigations. 469 U.S. at 341. In *T.L.O.*, this Court held that a search of a student at school does not need to be based on probable cause, but "simply on the reasonableness, under all the circumstances, of the search." *Id.* To be reasonable, the search must be justified in its inception, and be reasonably related to the circumstances that justified the search in the first place. *Id., citing Terry v. Ohio*, 392 U.S. 1, 20 (1968).

Likewise, in *Illinois v. Lidster*, 540 U.S. at 426-7, this Court applied the reasonableness standard to ascertain the reasonableness of limited stops of motorists, looking specifically to "the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."[4] This standard has been applied to detention of known witnesses to crimes. *See Walker v Orem*, 451 F.3d 1139, 1150 (10th Cir. 2006) (detaining

---

[4] The *Lidster* case is not cited or addressed in *Greene v. Camreta*, 588 F.3d 1011.

a family in their home for questioning, some held at gunpoint or in a squad car, was unreasonable).

In examining the reasonableness of an interview of a child in a child protection investigation, courts should consider the same three factors that this Court set forth in *Lidster*. First, the public's important interest and concern in ascertaining whether a child has been abused and needs protection from her parents or, alternatively, can safely be left at home. Second, a well-conducted interview of the child advances the public's compelling interest in protecting children from abuse.[5] Third, courts should consider the extent of interference with the child's liberty during an interview. The liberty involved is that of the child who, of course, is not free to leave school, and is in a public school setting.

In some child protection cases, the child will be questioned both by the police and child welfare professionals. The child may have witnessed a crime, but may also require protection. The most important fact is that the child, by definition, will not be the target of a criminal investigation. The child is being interviewed as a possible victim or witness, not as a person suspected of a crime. Sometimes, a criminal investigation will ensue, but the child will not be the defendant in any event. Moreover, many child protection investigations do not lead to criminal

---

[5] For a description of the best practices used to help ensure a complete and accurate interview, *see infra* at 23-9.

prosecutions against anyone, and it is not possible at the beginning of an investigation to know whether that will happen in a particular case.[6] In the present case, for example, S.G. was suspected of being a victim of sexual abuse, not a criminal suspect. The fact that a deputy sheriff was present when Camreta conducted the interview did not make S.G. less of a possible victim. In these circumstances, the court below should have applied the *Lidster* and *T.L.O.* reasonableness standard.

Other circuits have applied the reasonableness standard to child abuse investigations. In *Darryl H. v. Coler*, the Seventh Circuit, citing *T.L.O*, held that the Fourth Amendment prohibits only unreasonable searches, and that the standard of reasonableness requires balancing the need to search against the invasion that the search entails. 801 F.2d 893, 900 (7th Cir. 1986). Likewise, the Tenth Circuit has observed that "A brief detention by a social services caseworker is not of constitutional dimension." *Doe v. Bagan*, 41 F.3d 571, 575 (10th Cir. 1994). The Fourth Circuit has applied the reasonableness test to reject a foster mother's claim that removing foster children

---

[6] Child abuse cases are less likely to be prosecuted than most other felonies and less likely to result in incarceration. *See* Theodore P. Cross et al., *Prosecution of Child Abuse: A Meta-Analysis of Rates of Criminal Justice Decisions,* 4 Trauma, Violence & Abuse 323, 323-24 (2003). Most sexual abuse cases substantiated by child welfare professionals do not result in prosecution. Rebecca M. Bolen, *Child Sexual Abuse: Its Scope and our Failure,* Kluwer Academic/Plenum Publishers, 166 (2001).

from her home during a child abuse investigation was a violation of the foster mother's Fourth Amendment rights. *Wildauer v. Frederick Co.*, 993 F.2d 369, 372-3 (4th Cir. 1993). Likewise, as in Michelle's case, it was reasonable for the child protection investigator to interview Michelle at her school based upon her outcry to her friends at school. *See supra* at 4.

B. Requiring a Warrant, Exigent Circumstances, or Parental Consent for State Authorities to Interview a Suspected Child Abuse Victim is Too Restrictive of the Government's Compelling Goal to Protect its Child Citizens.

The Ninth Circuit's holding unnecessarily hinders child abuse investigations and endangers abused children who are entitled to prompt and effective protection. In the present case, the Ninth Circuit held that the traditional Fourth Amendment requirements of a warrant, court order, exigent circumstances, or parental consent apply to child abuse investigations. *Greene v. Camreta*, 599 F.3d at 1030. In finding that Camreta and Alford violated S.G.'s rights to be free from an unconstitutional seizure, the Ninth Circuit rejected the use of both the reasonableness standard and the special needs doctrine. *Id.* at 1025, 1027-8, 1033.[7]

---

[7] In requesting that this Court direct courts to apply a reasonableness standard when evaluating Fourth Amendment

(Continued on following page)

One of the problems with the approach adopted in the case at bar and similar cases is that obtaining a warrant or court order may be difficult if the abuse allegation is based on an anonymous or non-specific child abuse hotline call. At the outset of a child protection investigation, there may be no way for the authorities to know whether the investigation will reveal evidence of a crime that results in traditional law enforcement involvement that may implicate the Fourth Amendment. For example, if an anonymous report of child abuse alleges that an eight-year-old boy is abused because he has a large bruise on his face, the investigator may go to the school to briefly speak with the child. If the child tells the investigator that he received the bruise at soccer practice at school, the investigator can confirm this fact with the

---

issues in child protection investigations, the Public Guardian recognizes that in this Court's discretion, a "special needs" exception could be created for the initial stage of child protection investigations. Traditionally, no special needs exception applies when the primary purpose of law enforcement is the prosecution of crime. *Ferguson v. City of Charleston*, 532 U.S. 67, 85-6 (2001). The Public Guardian submits that if this Court created a special needs exception for child protection cases, two important concerns relating to children would deserve consideration. First, any special needs exception should apply when child protection investigators seek police assistance for valid safety concerns, as long as the sole purpose for police involvement is not to pursue a criminal prosecution. Second, mental health professionals caution that multiple interviews can seriously traumatize a child abuse victim. *See infra* at 25. For this reason, any special needs exception should allow child protection investigators and law enforcement officers to coordinate the initial interview of a child when possible.

coach of the soccer team. If the child's explanation is corroborated by the coach, no further investigation needs to be done and the case can be closed. Requiring the child abuse investigator to first obtain a court order or warrant to speak with the child at school will expend unnecessary resources and does little to protect children or their parents from needless judicial involvement. It could also subject the family to more state intrusion, such as physical exams or more extensive questioning of the child, when the matter could be simply disposed of through the investigator's initial interview.

Moreover, the original allegation may be too vague to obtain a warrant. The facts in *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999) illustrate this point.[8] There, an anonymous caller made a report that she heard a child screaming "No Daddy, No" at 1:30 in the morning. *Id.* at 810. The Ninth Circuit opined that the report could mean that the father was abusing the child, or "these words are often screamed at bedtime, and also in the middle of the night . . . " and might not relate to abuse at all. *Id.* at 813. That is the inherent problem with requiring that a search warrant be obtained every time a child abuse investigator interviews a child. Many times, the information obtained from the hotline call will not rise to the level

---

[8] In *Calabretta*, the Ninth Circuit found that the warrantless entry to a home to investigate child abuse violated the Fourth Amendment, especially where no emergency was shown. 189 F.3d at 813.

of an emergency or probable cause. For example, the initial hotline report regarding Angelica, whose father shaved her head to humiliate her, revealed no probable cause of abuse. *See supra* at 5. Only after speaking with the alleged victim, and possibly others, can child abuse investigators determine whether the child needs protection from abuse. As this Court observed in *Pennsylvania v. Ritchie*, 480 U.S. 39, 59-60 (1987), "Child abuse is one of the most difficult crimes to detect and prosecute, in large part because there often are no witnesses except the victim."

Also, the fact that a child abuse investigator did not immediately investigate a case does not always mean that no exigent circumstances existed. In *Greene v. Camreta*, the Ninth Circuit found that no exigent circumstances existed because Camreta and Alford waited three days to "detain and interrogate S.G." 588 F.3d at 1030, n.17. In the analysis of an emergency, delay "will not be hard to find: child welfare officers often must practice triage, deciding which endangered child must wait while another one, in seemingly greater peril, takes precedence." *Tenenbaum v. Williams*, 193 F.3d 581, 610 (2d Cir. 1999) (Jacobs, J., dissenting). If liability attaches to workers for removing a child, but no liability attaches for leaving a child in a home, the incentive "will be to allow some number of children – their constitutional rights preserved – to return home to a predatory adult." *Id.* at 611, *citing Deshaney v. Winnebago Co. Dep't of Soc. Servs.*, 489 U.S. 189, 201-2 (1989). The risk to the child does not lessen simply because child

abuse investigators delayed their initial interview with the child. *See Darryl H.*, 801 F.2d at 903, n.8. The delay may be because of overwhelming caseloads or an inept caseworker, not because exigent circumstances do not exist. Requiring strict adherence to a showing of exigent circumstances could result in many children remaining with their abusers, waiting for help that never comes.

Moreover, requiring parental consent before speaking with a child at a school could greatly impede a child abuse investigation or endanger the child. Some abusive parents will simply withhold consent. Or like Angelica and Isaiah's parents, will allow an interview but only in the parents' presence. *See supra* at 5. If the parent consents to the interview only if he can remain present, the integrity of the interview is undermined. *See infra* at 26. Many abused children refuse to disclose abuse within their abuser's hearing. Some children like Destiny and Angelica, once out of their abuser's care, report that they didn't tell the investigators who came to their home about the abuse because their parents were present. *See supra* at 3-4, 5-6. Also, by asking a parent's consent to speak with a child about abuse or neglect, the parent is alerted that an investigation is pending. This could place a child at risk of harm from a retaliatory abuser who warned the child not to disclose the abuse as in the case of Lisa, who stated that she was not allowed to talk about the abuse, or of Jamal, who didn't tell investigators about the abuse in

his parents' presence because he feared retaliation. *See supra* at 2-3, 4.

In cases where the non-offending parent does not believe that the abuse occurred or knows the abuse occurred and doesn't act to protect the child, the risk of recantation may increase if a child remains with that parent during the interview. *See infra* at 28-9. The facts in the present case show that S.G. recanted her allegations of sex abuse. After interviewing S.G. at school, she was allowed to return home. *Greene v. Camreta*, 588 F.3d at 1018. Camreta instructed the Greenes not to speak to S.G. or her sister about the abuse allegations. *Id.* However, Sarah Greene told Camreta that she had obtained an attorney to represent her husband and had talked to S.G. about the abuse allegations. *Id.* After S.G. was interviewed at the KIDS center, staff noted that S.G. may have recanted her statements in hopes of expediting her return home. *Id.* at 1019-20. Moreover, the District Court's ruling noted that K.G., S.G.'s younger sister, reported that S.G. had lied about the sex abuse, because "she overheard plaintiff [Sarah Greene] telling S.G. that she had lied." Pet. App. 60. The facts in the case at bar do not conclusively show that S.G. was pressured into recanting her statements. However, allowing a child to remain with her parents who know about abuse allegations but do not believe (or believe and don't act to protect her) raises the risk that the child may recant her statements of abuse or neglect. *See infra* at 28-9. Requiring parental consent to speak with potential child abuse victims would

frustrate the purposes of the investigation – discovering the truth and protecting children.

This Court should adopt the reasonableness test set forth in *T.L.O.* and *Lidster* to child protection investigations, reverse the ruling in *Greene v. Camreta*, and direct that courts should evaluate the facts and circumstances of a child protection investigation under a reasonableness standard.

III. SOCIAL SCIENCE RESEARCH SHOWS THAT ADHERING TO BEST PRACTICES INCREASES THE ACCURACY OF CHILD ABUSE INVESTIGATIONS, DECREASES THE TRAUMA SUFFERED BY CHILD ABUSE VICTIMS, AND SERVES THE STATE'S COMPELLING INTEREST TO REDUCE THE LONG-TERM NEGATIVE IMPACT CHILD ABUSE HAS ON SOCIETY.

"Best practices" are the most efficient methods to conduct child protection interviews that yield the most accurate information while limiting any further trauma to the child. Experts note that there is a "substantial degree of consensus regarding the ways in which investigative interviews should be conducted and a remarkable convergence with the conclusions suggested by a close review of the experimental and empirical literature." Michael E. Lamb, Yael Orbach, Irit Hershkowitz, and Phillip W. Esplin, *Structured forensic interview protocols improve the quality and informativeness of investigative interviews with*

children: A review of research using the NICHD Investigative Interview Protocol, 31 Child Abuse Neglect (Issues 11-12) 1201, 1202 (2007) [hereinafter Lamb (2007)].

The interview of an alleged child abuse victim is an essential component of any investigation, particularly in child sexual abuse cases. The American Academy of Pediatrics recognizes that approximately ninety percent of physical examinations of child and adolescent victims of sexual abuse are normal, even when penetration has occurred. Nancy Kellogg, MD and the Committee on Child Abuse and Neglect, *The Evaluation of Sexual Abuse in Children*, 116 Pediatrics (Issue 2) 506 (2005).[9] Thus, the interview of the child victim is often the most essential piece of an investigation. A majority of children with substantiated findings of sexual abuse who have not been subjected to suggestive interview techniques disclosed sexual abuse within the first or second formal investigative interview. Kamala London, Maggie Bruck, and Stephen J. Ceci, *Disclosure of Child Sexual Abuse: What Does Research Tell Us About the Ways That Children Tell?*, 11 Psychology, Public Policy, and Law (Issue 1) 194, 217 (2005). The scientific community strongly agrees about how to conduct interviews of sexually abused children to obtain the most reliable and accurate information.

---

[9] Accessible at http://pediatrics.aappublications.org/content/full/116/2/506 (last visited December 7, 2010).

Debra A. Poole and Michael E. Lamb, *Investigative Interviews of Children: A Guide for the Helping Professional*, 81 (1998) [hereinafter Poole & Lamb (1998)]; Lamb (2007) at 1202. Poole & Lamb note that research on interviewing child sexual abuse victims has been the greatest source of opinion on how to conduct investigatory child interviews generally. *Id.*

Experts agree that the number, timing and context of interviews along with the technique of the interviewer are significant factors in obtaining reliable information. Empirical evidence and expert consensus strongly support limiting the number of investigatory interviews of child victims of sexual abuse whenever possible. American Academy of Child & Adolescent Psychiatry, *Guidelines for the Clinical Evaluation for Child and Adolescent Sexual Abuse*, ¶ 6 (1990).[10] The primary purposes of limiting the number of interviews are to reduce potential trauma to the child, avoid duplicative efforts by law enforcement and child welfare investigators and increase the reliability of the information obtained from the interviews. In addition, interviews should be conducted as soon as possible after alleged abuse has occurred to improve the interview's quality and usefulness. Lamb (2007) at 1232; Tom Plach, *Investigating Allegations of Child and Adolescent Sexual Abuse: An Overview for Professionals*, 79 (2008) [hereinafter Plach (2008)].

---

[10] Accessible at www.aacap.org/.../guidelines_for_the_clinical_evaluation_for_child_and_adolescent_sexual_abuse (last visited December 7, 2010).

The context of the interview is also important. Ideally, the child will be interviewed alone, outside the presence of a parent, alleged perpetrator or anyone who could influence the child. Hollida Wakefield, *Guidelines on Investigatory Interviewing of Children: What is the Consensus in the Scientific Community?*, 24 American Journal of Forensic Psychology (Issue 3) 57, 60-1 (2006) [hereinafter Wakefield (2006)]; Donna Pence and Charles Wilson, *The Role of Law Enforcement in the Response to Child Abuse and Neglect*, ¶ 3 (1992)[11] [hereinafter Pence (1992)]; Plach (2008) at 79-80. For example, in Illinois, DCFS procedures require that all alleged child victims must be interviewed, and if at all possible, should be interviewed out of the presence of the child's parent and the alleged perpetrator. Illinois DCFS Procedure Section 300.50(c)(8) (2009).[12] Moreover, the child's information is more credible when he is interviewed out of the presence of adults with the ability and motivation to coerce, pressure or otherwise influence the child's statement. DCFS Procedure Section 300.60(m)(4) (2009).[13] The number of people present during an interview should be limited. Pence (1992) at ¶ 1. A neutral, non-authoritarian, supportive, safe, non-distracting physical environment

---

[11] Accessible at http://www.childwelfare.gov/pubs/usermanuals/law/lawf.cfm (last visited December 7, 2010).

[12] Accessible at http://dcfswebresource.dcfs.illinois.gov (last visited December 13, 2010).

[13] Accessible at http://dcfswebresource.dcfs.illinois.gov (last visited December 13, 2010).

increases the effectiveness of the interview by enhancing the child's retrieval capabilities and accuracy. *Id.* In Illinois, for example, when interviewing a child in a home where a parent's paramour lives with the family, any interview of a child should not take place with the parent or paramour present, and should take place in a neutral setting such as a school, or other place where the child feels safe. DCFS Procedure 300, Appendix H, V(a) (2004).[14]

Finally, the technique of the interviewer can greatly enhance the accuracy and reliability of the information obtained. Lamb (2007) at 1208. Good interviewing techniques can even enhance the effectiveness of interviews of children with low verbal abilities. *See generally* Jacinthe Dion and Mireille Cyr, *The use of the NICHD protocol to enhance the quantity of details obtained from children with low verbal abilities in investigative interviews: A pilot study*, 17 Journal of Child Sexual Abuse (Issue 2) 144, 144-162 (2010). Four of the most respected guidelines in investigative interviewing techniques have many features in common. Poole & Lamb (1998) at 87-99.[15] Common phases include (1) introduction, (2) building rapport, (3) practice interviewing, (4) setting ground

---

[14] Accessible at http://dcfswebresource.dcfs.illinois.gov (last visited December 13, 2010).

[15] The four interview guidelines are (1) The Cognitive Interview, (2) The Step-Wise Interview, (3) The NICHD Protocol, and (4) The American Professional Society on the Abuse of Children Guidelines. *Id.*

rules, and (5) asking open-ended questions to encourage narrative answers. *Id.* Evidence shows that the most reliable and accurate information comes from encouraging a child to give a narrative response. Lamb (2007) at 1203; Michael E. Lamb, Irit Hershkowitz, Yael Orbach, and Phillip W. Esplin, *Tell me what happened: Structured investigative interviews of child victims and witnesses*, 5 (2008). A court, when deciding the Fourth Amendment implications of a child's interview by a child abuse investigator and law enforcement, should rely upon this best practice approach to determine the reasonableness of a purported seizure.

Even when an interview conforms to all known best practices, child abuse experts and courts recognize that child sexual abuse victims frequently recant their disclosures of abuse due to pressure and influence from family members. *See Artiaga v. Money*, 2006 U.S. Dist. LEXIS 46935 (N.D. Ohio, Jul. 11, 2006), *citing United States v. Provost*, 969 F.2d 617, 621 (8th Cir. 1992) ("Recantation is particularly common when family members are involved and the child has feelings of guilt or the family members seek to influence the child to change her story"); *Myatt v. Hannigan*, 910 F.2d 680, 685 (10th Cir. 1990) ("[T]he child's recanting of her statement to family members is not atypical in sex abuse cases") (citations omitted); *see also* American Prosecutors Research Institute, *Investigation and Prosecution of Child Abuse*, Sage Publications, 94 (3d ed. 2004) (noting that in intra-family sex abuse cases, the

non-offending parent "may protect the child, pressure the child not to talk about the abuse, or persuade the child to recant the disclosure so the perpetrator does not face the criminal justice system"); Elaine R. Cacciola, *The Admissibility of Expert Testimony in Intrafamily Child Sexual Abuse Cases*, 34 U.C.L.A. L.REV. 175, 184-8 (1986) (noting susceptibility of child victim to family pressure and to recant the testimony to return things to "normal"). In *Greene v. Camreta*, S.G.'s recantation of her initial allegation of sex abuse by her father is consistent with these expert opinions. Although the record is not complete regarding the basis for S.G.'s recantation, the conversation between S.G. and her mother overheard by K.G. is significant. *See supra* at 22.[16]

Many jurisdictions, including Illinois, have established Children's Advocacy Centers (CAC), where child abuse victims can be interviewed in a manner consistent with the known best practices, including limiting the number of times a child is interviewed. In Illinois, in certain cases, the DCFS child protection investigator is instructed to coordinate his investigation with law enforcement and Child Advocacy Centers to limit the number of times a child is interviewed. *See generally* DCFS Procedure 300.70(b)(6)(13)(ii) (2009).[17]

---

[16] It should be noted that Mr. Greene pleaded guilty to abusing the seven-year-old boy who first reported abuse. *Greene v. Camreta*, 588 F.3d at 1020.

[17] Accessible at http://dcfswebresource.dcfs.illinois.gov (last visited December 13, 2010).

However, the urgent conditions of child protection investigations inevitably require an initial investigatory interview of a child. Sometimes CAC interviews can be scheduled on an emergency basis, but typically interviews are conducted within several days of the initial report of abuse. It is the child protection investigator's responsibility to determine whether or not the child can safely remain in the home pending the interview. Child protection investigators must be able to take initial investigatory steps which allow them to gather accurate and reliable information in order to protect children in a timely manner. Child protection investigations frequently require that the initial investigatory interview take place in the community where the child is located rather than more optimal settings like a CAC. However, immediate responders can still structure the interview to adhere to best practices supported by scientific research: the interview should be conducted outside the presence of the alleged perpetrator, the number of people participating in the interview should be limited and the environment should be private and structured to limit distractions.

The state not only has a compelling interest to protect abused children, but also has an interest in the negative impact child abuse has on the state when the abused children grow up. The Adverse Childhood Experiences (ACE) Study, a collaboration between the Centers for Disease Control and Prevention and Kaiser Permanente Health Plan, concluded that the frequency with which individuals experience

childhood abuse and neglect, along with other stressful events, increases the likelihood they will develop significant health and social problems.[18] Examples of these costly social and health problems are: alcoholism, chronic obstructive pulmonary disease, depression, fetal death, health-related quality of life, illicit drug use, ischemic heart disease, liver disease, risk for intimate partner violence, multiple sexual partners, sexually transmitted diseases, smoking, suicide attempts, unintended pregnancies, early initiation of smoking, early initiation of sexual activity, and adolescent pregnancy.[19] The ACE Study is consistent with other research showing an association between traumatic childhood events and mental health problems. Adults who were physically abused or neglected as children have been found to have an increased risk for major depression, and to be more likely to meet the criteria for at least one other mental disorder, such as post-traumatic stress disorder, drug dependence, dysthymia, or antisocial personality disorder.

---

[18] Accessible at http://www.cdc.gov/ace/findings.htm) (last visited December 7, 2010). In this ongoing study, 17,000 participants underwent standardized physical examinations and completed confidential surveys about childhood maltreatment, family dysfunction, and current health and behavior, and then continue with ongoing assessment of their health. The results support the conceptualization of "The ACE Pyramid," which postulates that there is a trajectory leading from adverse childhood experiences, to social, emotional, and cognitive impairments, to the adoption of health-risk behaviors, to disease, disability, and social problems, to early death.

[19] *Id.*

Cathy Spatz Widom, Kimberly DuMont, and Sally J. Czaja, A *Prospective Investigation of Major Depressive Disorder and Comorbidity in Abused and Neglected Children Grown Up*, 64 Archives of General Psychiatry (Issue 1) 49, ¶ 7 (2007);[20] Kate M. Scott, Don R. Smith and Pete M. Ellis, *Prospectively Ascertained Child Maltreatment and Its Association With DSM-IV Mental Disorders in Young Adults*, 67 Archives of General Psychiatry (Issue 7) 712, ¶ 7 (2010).[21]

Use of best practices when interviewing can greatly increase the accuracy of child protection investigations and decrease the trauma suffered by a child abuse victim. Furthermore, courts should use best practices as a guide when deciding whether a seizure was unreasonable under the Fourth Amendment during a child abuse investigation.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's decision should be reversed, and this Court should direct courts to recognize the child's independent rights, the states' right to implement reasonable child protection procedures, and to use the reasonableness test articulated in *New Jersey v. T.L.O.* and *Illinois v.*

---

[20] Accessible at http://archpsyc.ama-assn.org/cgi/content/full/64/1/49 (last visited December 7, 2010).

[21] Accessible at http://archpsyc.ama-assn.org/cgi/content/full/67/7/712 (last visited December 7, 2010).

Lidster when deciding whether a seizure during a child protection investigation was reasonable under the Fourth Amendment.

Respectfully Submitted,

ROBERT F. HARRIS
COOK COUNTY PUBLIC GUARDIAN
CHARLES PEREZ GOLBERT
KASS A. PLAIN*
MARY BRIGID HAYES
CAROL CASEY
DANIELLE GOMEZ
SUSAN S. WIGODA
NICHOLAS YOUNGBLOOD
Assistant Public Guardians
2245 West Ogden, Fourth Floor
Chicago, Illinois 60612
(312) 433-4300
kass.plain@cookcountyil.gov
Counsel for Amicus Curiae

**Counsel of Record*

Nos. 09-1454 and 09-1478

14

Supreme Court, U.S.
FILED
DEC 17 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

JAMES ALFORD, Deschutes County Deputy Sheriff,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE DISTRICT ATTORNEYS OF SAN DIEGO COUNTY, CALIFORNIA AND SACRAMENTO COUNTY, CALIFORNIA IN SUPPORT OF PETITIONERS, BOB CAMRETA AND JAMES ALFORD, DESCHUTES COUNTY DEPUTY SHERIFF

BONNIE M. DUMANIS
District Attorney of the County of San Diego, California
SOPHIA G. ROACH*
Deputy District Attorney
330 W. Broadway, Suite 860
San Diego, CA 92101
Tel: (619) 531-4217
Fax: (619) 515-8632
sophia.roach@sdcda.org

JAN SCULLY
District Attorney of the County of Sacramento, California
901 G Street
Sacramento, CA 95814
Tel: (916) 874-6218
Fax: (916) 874-5340
Counsel for Amici Curiae

* *Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

457 of 35

QUESTION PRESENTED

The state has a special need and historical obligation to protect children. Implicit in this relationship is the requirement for child abuse investigations to be conducted in a manner improving outcomes for children. Oregon and other states have adopted statutes which mandate non-discretionary, multidisciplinary, governmental investigations of all child abuse reports, but only permit involuntary provision of services when the state has reasonable cause to believe that abuse has occurred. A determination of reasonable cause is often impossible without an initial interview of the child. Should the state be required to obtain permission from a parent, who may be an abuser or enabler, to interview a reported child abuse victim on public school grounds during regular school hours, when neither probable cause nor exigent circumstances can be shown as demanded by the Ninth Circuit? Or should this Court find that these non-discretionary investigations serve a special need beyond that of normal law enforcement justifying a reasonable school interview of a child in order to determine if abuse has occurred without probable or even reasonable cause?

TABLE OF CONTENTS

Page

Question Presented i

Table of Authorities v

Interest of the *Amici Curiae* 1

Summary of Argument 2

Argument 4

A. The state has a "special need" and historical obligation to protect children which far exceeds the normal need for law enforcement detection and prosecution 4

1. Children are vulnerable and deserving of protection from abuse and the effective administration of services that improve their future outcomes 7

2. Statistical data show provision of services as a result of child protection investigations results in increased provision of voluntary preventive services to children, even when abuse claims are unsubstantiated..... 9

B. Artificial distinctions between government actors should not preclude the use of investigative techniques that improve outcomes for children 12

1. The participation of law enforcement is not prohibited in special needs cases..... 12

TABLE OF CONTENTS – Continued

Page

2. Modern law enforcement duties include functions traditionally reserved for regulatory administrators, social workers, community leaders, educators, and parents 14

3. The majority of states endorse a multidisciplinary approach to child protection and the participation of law enforcement officers in these multidisciplinary teams has specifically improved outcomes for children, which is necessary to further the regulatory scheme 16

C. Applying the warrant requirement of the Fourth Amendment to the initial interview of a child in a non-home setting will result in a failure to protect children..... 19

1. First indications to the state regarding alleged abuse of a child rarely provide sufficient information to prove probable cause or exigent circumstances and warrants based on less than probable cause have been disapproved 21

D. Oregon's child protection statute provides an adequate substitution for the warrant requirement..... 23

TABLE OF CONTENTS – Continued

Page

E. When an allegation of child abuse comes to the attention of state actors, confined by statute to a non-discretionary response, they should be able to conduct a reasonable interview with the child in a school setting without probable cause, reasonable suspicion, or parental consent in order to determine if the child needs protection 24

Conclusion..... 26

TABLE OF AUTHORITIES

Page

CASES

Board of Education v. Earls, 536 U.S. 822 (2002) 8

Delaware v. Prouse, 440 U.S. 648 (1979) 7, 8

Ferguson v. City of Charleston, 532 U.S. 67 (2001) 13, 14

Greene v. Camreta, 588 F.3d 1011 (2010) 2, 9

Griffin v. Wisconsin, 483 U.S. 868 (1987) 22

New York v. Burger, 482 U.S. 691 (1987) ..... *passim*

People v. Ray, 21 Cal.4th 464 (1999) 15

Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633 (2009) 26

United States v. Biswell, 406 U.S. 311 (1972) 20, 24

United States v. Martinez-Fuentes, 428 U.S. 543 (1976) 9, 10, 11, 13

Vernonia School District 47J v. Acton, 515 U.S. 646 (1995) 8

Wyman v. James, 400 U.S. 309 (1971) 5, 9

STATUTES

42 U.S.C. § 13031 (1990) 16

1993 Ore. ALS 546 ..... 6, 13

California Government Code § 26500 1

California Penal Code § 11174.3(a) (2010) 20

TABLE OF AUTHORITIES – Continued

Page

Or. Rev. Stat. § 419B.007 (2009) 6, 13

Or. Rev. Stat. § 419B.020 (2009) 23

Or. Rev. Stat. § 419B.045 (2009) 20

Supreme Court Rule 37.2(a).....1

Supreme Court Rule 37.4 1

OTHER AUTHORITIES

Doriane Lambelet Coleman, *Storming the Castle to Save the Child* 47 Wm. AND MARY L. REV. 413 (2005).....10

J. Robert Shull, *Emotional and Psychological Child Abuse: Notes on Discourse, History and Change* 51 STAN. L. REV. 1665 (1999).....5

Kenneth Dodge & Doriane Lambelet Coleman, *Preventing Child Maltreatment: Community Approaches*, The Guilford Press, 159 (2009).....10

Matthew Bell, *Fourth Amendment Reasonableness: Why Utah Courts Should Embrace the Community Caretaking Exception to the Warrant Requirement* 10 BOALT J. CRIM. L. 3 (2005).....15

NHTSA, *Children Traffic Safety Facts* DOT HS 811157 (2008), www.nhtsa.gov 7

Theodore P. Cross et al., *Police Involvement in Child Protective Services Investigations: Literature Review and Secondary Data Analysis*, Child Maltreatment, Vol. 10, No. 3, 221-244 (2005).....17, 18

TABLE OF AUTHORITIES – Continued

Page

U.S. Department of Health and Human Services, Administration on Children, Youth and Families, *Child Maltreatment* (2007), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm07/cm07.pdf 11

U.S. Department of Health and Human Services, Administration on Children, Youth and Families, *Child Maltreatment* (2008), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf 7, 12, 19, 20, 21

Vicky Bollenbacher & Taina Sakagawa, *Justice, Therapeutic and Hybrids and Implications for Children's Rights: A Review of State Policy*, Children and Youth Services Review 28 ECHYSR 6, 682-703 (2006) 16, 17

William J. Novak, *Common Regulation: Legal Origins of State Power in America* 45 HASTINGS L.J. 1061 (1994) 4, 5, 14

WEBSITES

http://sheriff.deschutes.org/Community/Kids-Safety (2010) 15

http://www.acf.hhs.gov/programs/cb/pubs/cm07/chapter2.htm#screen 11

http://www.acf.hhs.gov/programs/cb/pubs/cm07/chapter6.htm 11

http://www.acf.hhs.gov/programs/cb/pubs/cm08/chapter2.htm#dis 21

TABLE OF AUTHORITIES – Continued

Page

http://www.acf.hhs.gov/programs/cb/pubs/cm08/chapter4.htm 7

http://www.acf.hhs.gov/programs/cb/pubs/cm08/chapter5.htm 19

http://www.acf.hhs.gov/programs/cb/pubs/cm08/chapter7.htm#reports 12

http://www.nhtsa.gov (publication 811157) 7

INTEREST OF THE *AMICI CURIAE*

Amicus curiae, Bonnie Dumanis, District Attorney for the County of San Diego, State of California, submits this brief for filing as the authorized law officer of San Diego County, and on behalf of Jan Scully, District Attorney for the County of Sacramento, State of California, pursuant to Supreme Court Rules 37.2(a) and 37.4.[1]

Bonnie Dumanis is the elected District Attorney of San Diego County, California, a post she has held since 2003. Prior to 2003, she served as a Judge of the California Superior Court. As District Attorney, Ms. Dumanis is responsible for the criminal prosecution of all felony offenses, and state law misdemeanor offenses occurring outside the City of San Diego, within the county. San Diego County is a jurisdiction of over 3 million people. The District Attorney files

---

[1] The San Diego County Charter section 709 states: "The District Attorney is the public prosecutor of the County whose duties are prescribed by law. (Added, effective 8-7-86)." It is provided in the California general law that

> The district attorney is the general prosecutor, except as otherwise provided by law. The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for the public offenses.

Cal. Gov. Code, § 26500.

In addition, on November 10, 2010, counsel for both the Petitioner and the Respondent filed consents in this Court to the filing of *amicus curiae* briefs in support of either or neither party. *Supreme Court Docket* no. 09-1478.

over 45,000 criminal cases per year. The cases within her prosecution responsibility include physical abuse and sexual abuse and molest of child victims. By virtue of her position, District Attorney Dumanis is concerned with the protection of child victims, and the manner in which child victim cases are investigated.

Jan Scully is the elected District Attorney of Sacramento County, California, a post she has held since 1995. As District Attorney, Ms. Scully is responsible for the criminal prosecution of all felony offenses, and all state law misdemeanor offenses, within the county. Sacramento County is a jurisdiction of over 1.4 million people. The District Attorney reviews over 40,000 criminal cases per year, and files approximately 30,000 of those. The cases within her prosecution responsibility include physical abuse and sexual abuse and molest of child victims. By virtue of her position, District Attorney Scully is concerned with the protection of child victims, and the manner in which child victim cases are investigated.

SUMMARY OF ARGUMENT

The holding in *Greene v. Camreta*[2] has the potential to set back progress in child protection by enforcing an unreasonable and untenable requirement of

[2] *Greene v. Camreta*, 588 F.3d 1011 (2010).

state actors seeking to conduct interviews of children to determine if they have been victimized by abuse. The logic behind this rule of law was based on flawed information which failed to account for improved outcomes for children as a direct result of police involvement in child protection.

In response to the holding, attorneys for school boards throughout the jurisdiction of the lower court have issued written directives to staff prohibiting interviews of children related to events that did not occur at school without a warrant or order. The practical impact is that law enforcement is hampered in child protection investigations and other preliminary criminal investigations which benefitted from the availability of a safe forum to conduct consensual investigative interviews without exposure to scrutiny by a police-wary community, familial pressure, or the knowledge of an abusive parent.

This brief establishes that statutory schemes such as Oregon's which regulate child protection in a non-discretionary manner by requiring a response to all reports of child abuse in a cooperative effort by social services and law enforcement in order to improve outcomes for children are an essential component of the state's special need to protect children in a manner that far exceeds the goals of normal crime detection.

In conducting an analysis of existing case law relevant to special needs searches that require no warrant or individualized suspicion, it is clear that

Oregon's child protection regulatory scheme meets the standards of eligibility established by the United States Supreme Court. It serves a legitimate special need; it was not conceived for the purposes of law enforcement; it employs non-discretionary standards, and the reasonable location, time, and manner requirements are satisfied in the current context where the mandated investigation is conducted in a public school during regular school hours by trained professionals whose complimentary skill sets are designed to further the state's heavy interest in child protection.

ARGUMENT

A. The state has a "special need" and historical obligation to protect children which far exceeds the normal need for law enforcement detection and prosecution.

Identifying the origins of state power in America, historian William Novak noted the doctrine of *parens patriae* was derived from the "amiable capacity" of the king "to take care of his subjects as are legally unable, on account of mental incapacity whether it proceed from first nonage: second, idiocy; or third, lunacy: to take proper care of themselves and their property."[3] The historical record demonstrates that in

[3] William Novak, *Common Regulation: Legal Origins of State Power in America*, 45 HASTINGS L.J. 1061, 1093-1094

(Continued on following page)

the late 18th and early 19th centuries states passed laws which reflected the government's role as an insurer of public happiness – regulating personal conduct when it offended others. Among those early regulations was the identification of those who abandoned their children as disorderly persons.[4] Less than 50 years after the signing of the United States Constitution and before the death of James Madison, New York City enacted the first statute enabling government officials to "commit to the almshouse, or other suitable place . . . any child found in a state of want or suffering, or abandonment, or improperly exposed or neglected by its parents. . . ."[5]

Though far less draconian than the New York City statute, most states have developed well studied programs to effectively prevent, investigate, and protect children from abuse. Justice Blackmun's proclamation: "[t]here is no more worthy object of the public's concern" than the need to aid and protect dependent children,[6] has been adopted by legislators throughout the nation, including the Legislative Assembly of Oregon.

(1994) (citing Joseph Chitty, *A Treatise on the Law of the Prerogatives of the Crown* 4 (1820)).

[4] Novak, *supra*, at n 49 and n 53.

[5] J. Robert Shull, *Emotional and Psychological Child Abuse: Notes on Discourse, History and Change*, 51 STAN. L. REV. 1655, 1686 (1999) (citing Homer Folks, *The Care of Destitute, Neglected, and Delinquent Children* 97 (1900)).

[6] *Wyman v. James*, 400 U.S. 309, 318 (1971).

> [F]or the purpose of facilitating the use of protective social services to prevent further abuse, safeguard and enhance the welfare of abused children, and preserve family life when consistent with the protection of the child by stabilizing the family and improving parental capacity, it is necessary and in the public interest to require mandatory reports and investigations of abuse of children and to encourage voluntary reports.[7]

Though the statute was not enacted until 2009, the preceding statute which was amended in 1993 similarly recognized:

> It is the policy of the state of Oregon to recognize that children are individuals who have legal rights and are not chattels of their parents or guardians. [Child protection statutes] . . . shall be liberally construed to the end that a child coming within the jurisdiction of the court may receive such care, guidance, treatment and control as will lead to the child's welfare and the protection of the community. Although there is a strong preference that children live in their own homes with their own families, the state recognizes that this is not always possible or in the best interests of the child or the public.[8]

Oregon statutes mandating investigation of all child abuse reports and collaboration with law

---

[7] Or. Rev. Stat. § 419B.007 (2009).

[8] 1993 Ore. ALS 546.

enforcement are silent on the issues of apprehension or prosecution of criminals, proving they serve a purpose other than the normal needs of law enforcement.

1. Children are vulnerable and deserving of protection from abuse and the effective administration of services that improve their future outcomes.

The fact that children are vulnerable requires no proof beyond common experience. Children are typically smaller, less informed, have fewer physical liberties, and no control over their parentage, which at times can result in abuse or death.

As many children are killed each year by abusers as they are in automobile accidents.[9] This fact is important in determining a "special need" as this Court impliedly did in the context of approving non-discretionary traffic checkpoints, while striking down the same activity when it involved individual discretion of officers. Writing for the majority in *Delaware v. Prouse*, Justice White made clear the Court's awareness of "danger to life and property posed by

---

[9] NHSTA, *Children Traffic Safety Facts*, DOT HS 811157 (2008) (citing 1,347 fatalities for children 0-14 years old), *available at* http://www.nhtsa.gov (publication 811157); U.S. Department of Health and Human Services, Administration on Children, Youth and Families, *Child Maltreatment*, Chapter 4 (2008) (citing 1,740 fatalities for children 0-18), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm08/chapter4.htm.

vehicular traffic," even without the support of statistics, and that regulating compliance in an appropriate manner was an "essential [element] in a highway safety program."[10] In *Vernonia School District 47J v. Acton*, Justice Scalia, on behalf of the Court, recognized a special needs exception for random drug testing amongst student athletes who were, as a group, proved to be involved in heightened instances of drug use.[11] On the basis that the combination of drugs and exertion could lead to injury or death of children, the Court endorsed random drug testing without individualized suspicion.[12] That same emphasis on child safety was echoed by Justice Thomas writing for the majority in *Board of Education v. Earls*: "[S]afety factors into the special needs analysis."[13] Justice Thomas' opinion in *Earls* is particularly helpful in that it approved the special needs search without any evidence of a heightened drug problem amongst the targeted students. Satisfied that "drug use carries a variety of health risks for children including death from overdose," the Court upheld its second child-protection based drug testing policy in a public school setting.[14]

---

[10] *Delaware v. Prouse*, 440 U.S. 648, 670 (1979).

[11] *Vernonia School District 47J v. Acton*, 515 U.S. 646, 649, 664-665 (1995).

[12] *Id.* at 661-665.

[13] *Board of Education v. Earls*, 536 U.S. 822 (2002).

[14] *Id.* at 836-837.

Other special needs cases have upheld warrantless, non-discretionary searches and seizures in less life threatening circumstances such as routine social service inspections, illegal immigration, and closely regulated activities.[15] Bolstering the case for child protection as a special need of the state is made simpler by the fact that the child in reported abuse cases is not suspect in the investigation.

2. Statistical data show provision of services as a result of child protection investigations results in increased provision of voluntary preventive services to children, even when abuse claims are unsubstantiated.

Addressing the Ninth Circuit's claim that child abuse investigations pose a risk of harm to more children than they help, one need only examine the source of their information for proof of error. Citing a law review article published by a respected Fourth Amendment scholar and advocate for child rights, the court justified its traditional Fourth Amendment approach to initial child abuse interviews.[16] The article relies primarily on anecdotal evidence from a handful of lower court cases to inflame the reader. Unlike the staid interview in this case, all but one of

---

[15] *Wyman, supra*; *U.S. v. Martinez-Fuentes*, 428 U.S. 543 (1976); *New York v. Burger*, 482 U.S. 691 (1987).

[16] *Greene v. Camreta*, *supra*, at 1016 (2010).

the lower court cases involved a strip search, removal, or unauthorized medical examination of the child. The exception was a case which took place in a private school setting and involved unreasonable investigative techniques. In a recently published book on preventing child maltreatment, the author herself suggests that open ended interviews of reported victims are far less intrusive than the conduct reported in the cases cited by both her and the Ninth Circuit.[17]

Using statistics cited by the U.S. Department of Health and Human Services in their *Child Maltreatment Report*, author Doriane Lambelet Coleman compared the number of investigations to the number of substantiated claims as the best support for her argument that "in the name of saving children . . . states ultimately cause more harm to many more children than they ever help."[18]

Not surprisingly, similar statistics had been analyzed in other special needs cases. The Court in *Martinez-Fuentes* included statistics showing that of the 10 million cars passing through the border checkpoint, substantially less than one percent carried illegal immigrants.[19] This was of no moment for the

---

[17] Kenneth Dodge, editor and Doriane Lambelet Coleman editor and author, *Preventing Child Maltreatment: Community Approaches*, The Guilford Press, 159 (2009).

[18] Doriane Lambelet Coleman, *Storming the Castle to Save the Child*, 47 WM. AND MARY L. REV. 413, 417 and n.8 (2005).

[19] *U.S. v. Martinez-Fuentes*, *supra*, at 554.

Court as it endorsed the checkpoint, even in the case of secondary inspections which detected illegal activity in less than twenty-five percent of all vehicles selected for more rigorous screening.[20]

Lambelet Coleman's analysis also fails to account for rejections based on duplication, lack of jurisdiction, instances where insufficient information is provided to initiate a case, and where abuse occurred, but there is insufficient evidence to warrant further action – a too common problem in child abuse.[21] But most damaging to her hypothesis is that of the 3.2 million reports of abuse documented in the 2007 *Maltreatment Report* and referred to in *Greene*, 3.8 million children received preventive services including: respite care, parenting education, housing assistance, substance abuse treatment, daycare, and individual and family counseling.[22] Approximately 333,000 substantiated victims of abuse and 757,000 non-victims received voluntary, in-home post investigation services aimed at identifying family weaknesses and strengths in order to provide targeted supportive services.[23] That these services protect

---

[20] *Id.* at 554 and 563.

[21] U.S. Department of Health and Human Services, Administration on Children, Youth and Families, *Child Maltreatment* (2007), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm07/chapter2.htm#screen.

[22] *Id.*, *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm07/chapter6.htm.

[23] *Ibid.*

children cannot be ignored. "Sexual abuse has declined 53 percent from 1992–2007, and physical abuse has declined 52 percent" in the same time.[24] Certainly, advances in child protection including multidisciplinary, mandated reporting and investigation, as well as preventive treatment of child abuse have played a role in this momentous reduction.

B. Artificial distinctions between government actors should not preclude the use of investigative techniques that improve outcomes for children.

The Constitution does not distinguish between types of government actors when limiting state power nor should the Court distinguish between them in assessing whether the state can act to protect the public in special needs cases.

1. The participation of law enforcement is not prohibited in special needs cases.

New York v. Burger upheld a special needs search conducted jointly by police officers and state agents, in part because the Court "fail[ed] to see any constitutional significance in the fact that police officers, rather than 'administrative' agents, [were] permitted to conduct the § 415-a5 inspection."[25] That same

---

[24] *Child Maltreatment*, *supra* (2008), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm08/chapter7.htm#reports.

[25] *New York v. Burger*, *supra*, at 717.

opinion noted two other cases where special needs searches were conducted by state actors with traditional police powers.[26] The Court has also endorsed checkpoint stops by Border Patrol agents and joint compliance searches by probation and police.[27]

While some may point to *Ferguson v. City of Charleston*[28] to counter this argument, it was not the involvement of law enforcement *per se*, but rather the development of a specific plan to provide medical testing results to police, threatening prosecution to exact compliance with drug treatment while offering no different medical treatment to either mother or child that so offended the court. *Ferguson* is distinguishable in five significant ways from the instant case:

1. Oregon's child protection statutes provide additional services to children upon a finding of reasonable cause to suspect abuse and they were not devised for the primary purpose of general crime detection as evidenced by the legislative intent expressed in Or. Rev. Stat. § 419B.007 and 1993 Ore. ALS 546.

2. The purpose of the interview was plain and law enforcement involvement was not secreted from the child.

---

[26] *New York v. Burger*, *supra*, at n.28.

[27] *U.S. v. Martinez-Fuentes*, *supra*.

[28] *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

3. There was no search of the person during the school interview.

4. There was no likelihood that the child subject of the alleged seizure was going to be prosecuted or have evidence used against her in any punitive sense.

5. Contrary to findings in *Ferguson* that demonstrated the program discouraged prenatal care by drug users, there is no evidence that child abuse will increase on account of school interviews in mandatory, non-discretionary child protection investigations.

2. Modern law enforcement duties include functions traditionally reserved for regulatory administrators, social workers, community leaders, educators, and parents.

Early police power in America promoted "a well-ordered community devoted to the public happiness and public good."[29] This is still the function of police, who even in their traditional roles help victims of crime who rely on them to intervene in violent scenarios and protect them from danger. "'[O]ur contemporary society . . . is an impersonal one. Many of us do not know the names of our next-door neighbors. Because of this, tasks that neighbors, friends and

---

[29] Novak, *supra*, at 1085.

relatives may have performed in the past now fall to the police.'"[30]

The website of the Deschutes County Sheriff's Department provides significant insight into the obligations of modern law enforcement agencies in small counties. In addition to traditional investigation, they also operate a marine and forest patrol and are responsible for civil enforcement. They maintain a "Kid's Corner" website with tips for internet, bicycle, and water safety, prevention of sexual abuse, and a buddy program for children of incarcerated parents. All deputies are required to complete the "Darkness to Light" child protection investigation program operated by the Kids Center, a non-profit, multidisciplinary child protection agency.[31]

The import of these facts is that Deschutes County sheriff's deputies do not function in an isolated world of arrest and prosecution, but play a larger role in the promotion of public good which makes arbitrary distinctions between them and certain other government actors unreasonable when tasked with the mandatory investigation of reported child abuse.

---

[30] Matthew Bell, *Fourth Amendment Reasonableness: Why Utah Courts Should Embrace the Community Caretaking Exception to the Warrant Requirement*, 10 BOALT J. CRIM. L. 3, 9 (2005) (citing *People v. Ray*, 21 Cal.4th 464, 472 (1999) (citation omitted)).

[31] Deschutes County Sheriff's Office, *available at* http://sheriff.deschutes.org/Community/Kids-Safety (2010).

3. The majority of states endorse a multidisciplinary approach to child protection and the participation of law enforcement officers in these multidisciplinary teams has specifically improved outcomes for children, which is necessary to further the regulatory scheme.

Eighty percent of states in our nation require law enforcement agents to be involved in emergency removals of children and 67% are required to take all emergency calls reporting child abuse or neglect.[32] More than half of the states have adopted a multidisciplinary approach to child protection.[33] Joint child protection efforts are even codified in federal law: "All reports received shall be promptly investigated, and whenever appropriate, investigations shall be conducted jointly by social services and law enforcement personnel, with a view toward avoiding unnecessary multiple interviews with the child."[34]

This hybrid approach which joins law enforcement (Justice Model) and social service (Therapeutic Model) disciplines in child protection is hailed, almost universally, as the best method for improving

---

[32] Vicky Bollenbacher & Taina Sakagawa, *Justice, Therapeutic and Hybrids and Implications for Children's Rights: A Review of State Policy*, Children and Youth Services Review 28 ECHYSR 6, 682-703 (2006).

[33] *Ibid.*

[34] 42 U.S.C. § 13031 (1990).

outcomes for children.[35] "In terms of children's rights a Hybrid Model should work best for securing the full range of just rights claims. The Hybrid Model presents opportunities for both the best of the Therapeutic Model and the best of the Justice Model to be obtained simultaneously."[36]

A recent and comprehensive review of available data and literature on the subject of police involvement in child protection services by the director of the National Evaluation of Children's Advocacy Centers, which studies the effectiveness of current models of child abuse investigation, concluded:

> [P]olice do not appear to hinder CPS effectiveness and may, in fact, promote it. Police involvement may increase the probability that CPS finds allegations of maltreatment credible and provides services. . . . There is currently no empirical concern about systematic negative effects of law enforcement involvement on CPS investigations. We recommend that law enforcement and CPS coordinate their child abuse and neglect investigations in every community."[37]

---

[35] Bollenbacher et al., *supra*; Theodore Cross et al., *Police Involvement in Child Protective Services Investigations: Literature Review and Secondary Data Analysis*, Child Maltreatment, Vol. 10, No. 3, 224-244 (2005).

[36] Bollenbacher et al., *supra*.

[37] Cross et al., *supra*, at 241-242.

In assessing the particular benefit added by police, the report deemed it possible that "police involvement helps enable CPS interventions by providing more thorough investigations and a greater quantity of evidence. This may help CPS substantiate more cases. . . . Police may also provide support, authority, safety, and investigative expertise to CPS workers, empowering them to work more effectively."[38] This promotion of better outcomes for children "is necessary to further the regulatory scheme."[39] And so this Court has recognized:

> [S]tate police officers . . . have numerous duties in addition to those associated with traditional police work. (citations omitted.) As a practical matter, many States do not have the resources to assign the enforcement of a particular administrative scheme to a specialized agency. So long as a regulatory scheme is properly administrative, it is not rendered illegal by the fact that the inspecting officer has the power to arrest individuals for violations other than those created by the scheme itself. In sum, we decline to impose upon the States the burden of requiring the enforcement of their regulatory statutes to be carried out by specialized agents.[40]

[38] Cross et al., *supra*, at 241.

[39] *New York v. Burger*, *supra*, at 710.

[40] *Id.* at 717-718.

Law enforcement officers are not precluded by precedent from acting to further a state's special needs, further their participation in regulation of child protection results in better outcomes for children due to their specialized investigative training and multifaceted role as government actors. The lower court's opinion has upset this important regulatory service. No sooner was the opinion published when law firms for school districts within the Ninth Circuit's jurisdiction issued mandatory restrictions on the access to children at public schools during school hours without a warrant or written consent of a parent. This Court should not restrict the good work of law enforcement in the regulation of child protection, as did the lower court when it established an arbitrary distinction between government actors in order to reject a claim of special need.

C. Applying the warrant requirement of the Fourth Amendment to the initial interview of a child in a non-home setting will result in a failure to protect children.

More than 80% of all child abuse is perpetrated by parents and thus likely to occur within the protected curtilage of the abuser's home.[41] Children are twice as likely to be abused by their mother and 18%

[41] U.S. Department of Health and Human Services, *supra* (2008), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm08/chapter5.htm

of the time the child will be abused by both parents.[42] This makes the investigation of child abuse particularly difficult as the child may have been groomed into silence, beaten into submission, or so emotionally disabled that he or she is incapable of report. Additional complications include love for the abusive parent, fear of dramatic consequences for the child and any siblings, and loss of support from a non-abusive, yet abuse-enabling parent.

These circumstances, inherent in the overwhelming majority of child abuse cases, demonstrate the necessity for school interviews. So helpful is it to have a neutral location where the child can feel safe away from the influence of the abuser that states have enacted laws with specific procedures for interviewing reportedly abused children at school.[43] The school setting helps to "carefully [limit] the time, place, and scope" of government action, which is required in special needs cases.[44]

---

[42] *Ibid.*

[43] Cal. Pen. Code § 11174.3(a) (2010); Or. Rev. Stat. § 419B.045 (2009).

[44] *New York v. Burger*, 482 U.S. 691, 703 (1987) (citing *United States v. Biswell*, 406 U.S. 311, 315 (1972).)

1. First indications to the state regarding alleged abuse of a child rarely provide sufficient information to prove probable cause or exigent circumstances and warrants based on less than probable cause have been disapproved.

While the concern for abuse in the instant case evolved from another child protection investigation, it highlights the difficulties of predicating an initial interview on the development of probable cause or reasonable suspicion under the most common circumstances. The majority of child abuse investigations are generated by professionals who have a legal obligation to disclose all allegations of abuse.[45] Rarely will this be someone with personal knowledge of the facts. Less than 15% of reporters have non-professional relationships with the child.[46] Instead, teachers, legal and medical personnel, and law enforcement are likely to report second- or even third-hand accounts of the abuse. In child abuse, the impossibility of securing a warrant without an opportunity to conduct an initial report with the child has far less to do with time constraints, and everything to do with the quantum of evidence presented in an initial referral.

---

[45] U.S. Department of Health and Human Services, *supra* (2008), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm08/chapter2.htm#dis

[46] *Ibid.*

Further complicating matters is the Court's disapproval of warrants based on less than probable cause in *Griffin v. Wisconsin*.[47] In assailing the dissent of Justice Blackmun, who advocated that a warrant based on less than probable cause would be a better substitute for unbridled probation searches, Justice Scalia reasoned for the majority that "[t]he Constitution prescribes . . . that where the matter is of such a nature as to require a judicial warrant, it is also of such a nature as to require probable cause."[48]

These sad realities do not bode well for the protection of children. Without an exception to the traditional Fourth Amendment requirements, state actors will be paralyzed by a lack of information and forced to close unsubstantiated cases leaving children unprotected. While some could argue the merits of further investigation, a crime that involves the intimate infliction of violence, sexual abuse, or neglect by a parent usually requires information from an insider – the victim or his siblings. In the Ninth Circuit, abusers are free to thwart such investigations by refusing consent to interview the child. Shrouded in the cocoon of child privacy, the abuser may continue his or her campaign of terror.

In no other scenario would courts impose a requirement of consent by a potential offender in order to speak with a victim, outside of the home,

---

[47] *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987).

[48] *Ibid.*

when neither probable cause nor exigent circumstances can be demonstrated.

D. Oregon's child protection statute provides an adequate substitute for the warrant requirement.

Deschutes County sheriff's deputies are mandated by law to respond to all reports of child abuse they receive. "If the department of Human Services or a law enforcement agency receives a report of child abuse, the department or agency shall immediately: (a) Cause an investigation to be made to determine the nature and cause of the abuse of the child."[49]

The imperative nature of the statute and the identification of the parties responsible for investigation satisfies the Court's rule in *New York v. Burger* where a statutory regulation was deemed to be an adequate substitute for a warrant because "the vehicle dismantler knows that the inspections to which he is subject do not constitute discretionary acts by a government official, but are conducted pursuant to statute . . . and notifies the operator who is authorized to conduct such an investigation."[50]

---

[49] Or. Rev. Stat. § 419B.020 (2009).

[50] *New York v. Burger*, *supra*, at 711.

E. When an allegation of child abuse comes to the attention of state actors, confined by statute to a non-discretionary response, they should be able to conduct a reasonable interview with the child in a school setting without probable cause, reasonable suspicion, or parental consent in order to determine if the child needs protection.

> A [s]tate can address a major social problem both by way of an administrative scheme and through penal sanctions. Administrative statutes and penal laws may have the same ultimate purpose of remedying the social problem, but they have different subsidiary purposes and prescribe different methods of addressing the problem. . . . [A] regulatory approach contrasts with that of the penal laws, a major emphasis of which is the punishment of individuals for specific acts of behavior.
>
> In *United States v. Biswell*, we recognized this fact that both administrative and penal schemes can serve the same purposes by observing . . . the ultimate purposes of the . . . Act [and the statute to be in harmony].[51]

The Oregon statutes directing child protection investigations are qualifying administrative statutes which notify the public that joint investigations of child abuse reports by law enforcement and social

---

[51] *Id.* at 712-713 (text in brackets not in original).

services are mandated by law. The statutory scheme upon which these statutes rest was designed to serve a special need of government: the protection of children from abuse. The regulations enacted support that function by providing efficient and effective procedures which improve outcomes for children as proved by concrete data. The statutes are not based on criminal sanctions, but rather the provision of adequate services to insure their health and safety.

These regulations provide an adequate substitute for the warrant requirement as they are non-discretionary and clearly advise the public which government actors are permitted to investigate reports of child abuse. The regulations do not permit the imposition of involuntary services unless there is reasonable cause to believe that a child has been abused. Even then, the statutory scheme mandates services designed to keep families intact where warranted.

School interviews, which are also authorized under the scheme, further the special needs of the government's interest in protecting children by allowing interviews in a safe location that is known to the child during regular business hours where school officials charged with the care of the child can intervene in any unreasonable conduct by other government actors.

Interviews of children are the least intrusive means available to government actors in a child protection investigation. The case at hand presents

no issue of refused consent, trickery, or intrusive search during the relevant encounter with S.G. Instead it asks for permission to "follow up" with questions as impliedly endorsed by Justice Ginsberg in her concurrence and dissent in *Safford v. Redding*.[52]

CONCLUSION

Having satisfied each prong of the special needs test that has evolved through the opinions of this Court, the *amici* seek approval for reasonable interviews of all reported victims of child abuse at school during school hours without requiring probable cause or reasonable suspicion.

Dated: December 17, 2010

Respectfully submitted,

BONNIE M. DUMANIS
District Attorney of the
County of San Diego, California
JAN SCULLY
District Attorney of the
County of Sacramento, California

SOPHIA G. ROACH
Deputy District Attorney
Counsel of Record
Counsel for Amici Curiae

[52] *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633, 2645 (2009) (Ginsberg concurring in part, dissenting in part).

Nos. 09-1454 and 09-1478 (Consolidated)

In the Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, Personally and as Next Friend for S.G., a Minor, and K.G., a Minor,

Respondent.

JAMES ALFORD, DESCHUTES COUNTY DEPUTY SHERIFF,

Petitioner,

v.

SARAH GREENE, Personally and as Next Friend for S.G., a Minor, and K.G., a Minor,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF RESPONDENT

LAWRENCE J. JOSEPH
1250 CONN. AVE. NW #200
WASHINGTON, DC 20036
(202) 669-5135
ljoseph@larryjoseph.com

Counsel for Amicus

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTIONS PRESENTED

These consolidated cases present three questions, with two essentially mirroring each other to phrase the merits question and one raised only in No. 09-1454, but essentially common to both cases.

1. Does the Fourth Amendment require a warrant, a court order, parental consent, or exigent circumstances before law enforcement and child welfare officials may conduct a temporary seizure and interview at a public school of a child whom they reasonably suspect was being sexually abused by her father? (No. 09-1478)
2. The state received a report that a nine-year-old child was being abused by her father at home. A child-protection caseworker and law-enforcement officer went to the child's school to interview her. To assess the constitutionality of that interview, the Ninth Circuit applied the traditional warrant/warrant-exception requirements that apply to seizures of suspected criminals. Should the Ninth Circuit, as other circuits have done, instead have applied the balancing standard that this Court has identified as the appropriate standard when a witness is temporarily detained? (No. 09-1454)
3. The Ninth Circuit addressed the constitutionality of the interview in order to provide "guidance to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment[,]" and it thus articulated a rule that will apply to all future child-abuse investigations. Is the Ninth

Circuit's constitutional ruling reviewable, notwithstanding that it ruled in petitioner's favor on qualified immunity grounds? (No. 09-1454)

In this brief, *amicus curiae* Eagle Forum answers Questions 1 and 2, which essentially cover the same merits issues.

TABLE OF CONTENTS

Pages

Questions Presented i

Table of Contents iii

Table of Authorities v

Interest of *Amicus Curiae* 1

Constitutional Background 2

Statement of Facts 3

Summary of Argument 5

Argument 7

I. The Fourth Amendment Requires a Warrant or Warrant Exception to Seize a Minor Child in a Criminal Investigation 7

A. Existing Fourth-Amendment Flexibility Suffices for Seizing Minor Children in Criminal Investigations 9

B. The Petitioners' Seizure of S.G. Was Not Reasonable under *Terry* 11

II. The Petitioners' Proposed Tests for "Reasonableness" Cannot and Do Not Justify the Seizure of S.G. 13

A. The "Special Needs" Exceptions Do Not Apply to Criminal Investigations 13

B. *Lidster* Did Not – and this Court Should Not – Create a *Per Se* Fourth-Amendment Exception for Seizing Witnesses 14

C. *T.L.O.* Did Not – and this Court Should Not – Create a *Per Se* Fourth-Amendment Exception for Seizing Minors in Public Schools 16

D. The Seizure of S.G. Cannot Survive *Any* Framework Consistent with the Fourth Amendment 19
Conclusion 20

TABLE OF AUTHORITIES

Pages

Cases

Brigham City, Utah v. Stuart, 547 U.S. 398 (2006) 9

Brown v. Texas, 443 U.S. 47 (1979) 11

Camara v. Municipal Court of City & County of San Francisco, 387 U.S. 523 (1967) 7, 8

City of Indianapolis v. Edmond, 531 U.S. 32 (2000) 12, 15-16

Colorado v. Bertine, 479 U.S. 367 (1987) 9

Ferguson v. City of Charleston, 532 U.S. 67 (2001) 13-14

Frost v. Railroad Comm'n of State of California, 271 U.S. 583 (1926) 18-19

Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009) 4

Illinois v. Lidster, 540 U.S. 419 (2004) 6, 14-16, 19, 20

Lassiter v. Dep't of Social Services, 452 U.S. 18 (1981) 3, 10-11

Mapp v. Ohio, 367 U.S. 643 (1961) 2

Mathews v. Eldridge, 424 U.S. 319 (1976) 10, 11

Mohamed v. Jeppesen Dataplan, Inc., 614 F.3d 1070 (9th Cir. 2010) 16-17

New Jersey v. T.L.O., 469 U.S. 325 (1985) 9, 13, 14, 16-18

New York v. Burger, 482 U.S. 691 (1987) 9

Pierce v. Society of Sisters,
268 U.S. 510 (1925) 2-3
Santosky v. Kramer, 455 U.S. 745 (1982) 3, 10
Skinner v. Railway Labor Executives' Ass'n.,
489 U.S. 602 (1989) 19
Terry v. Ohio,
392 U.S. 1 (1968) 6, 7, 8, 10-13, 19-20
U.S. v. Brignoni-Ponce, 422 U.S. 873 (1975) 7
U.S. v. Dionisio, 410 U.S. 1 (1973) 9
U.S. v. Place, 462 U.S. 696 (1981) 12
Vernonia Sch. Dist. 47J v. Acton,
515 U.S. 646 (1995) 17
Wisconsin v. Yoder, 406 U.S. 205 (1972) 3

Statutes

U.S. CONST. amend. IV ..... *passim*
U.S. CONST. amend. V 5
U.S. CONST. amend. V cl. 4 ..... 2, 5, 8
U.S. CONST. amend. XIV 2, 5
U.S. CONST. amend. XIV, §1, cl. 3 ..... 3, 5, 8

Rules, Regulations and Orders

S. Ct. Rule 37.6 2

Other Authorities

Timothy J. Gilfoyle, *The Moral Origins of Political Surveillance: The Preventive Society in New York City, 1867-1918*, 38 AMERICAN QUARTERLY 637 (1986) 5
Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth*

Amendment, 47 WM. & MARY L. REV. 413 (2005) 5

JANE WALDFOGEL, THE FUTURE OF CHILD PROTECTION: HOW TO BREAK THE CYCLE OF ABUSE AND NEGLECT (Harvard University Press 1998) 5

Nos. 09-1454 and 09-1478 (Consolidated)

In the Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, Personally and as Next Friend for S.G., a Minor, and K.G., a Minor,

Respondent.

JAMES ALFORD, DESCHUTES COUNTY DEPUTY SHERIFF,

Petitioner,

v.

SARAH GREENE, Personally and as Next Friend for S.G., a Minor, and K.G., a Minor,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("Eagle Forum")[1] is a nonprofit

[1] *Amicus* Eagle Forum files this brief with the consent of all parties; Petitioners' and Respondent's written letters of consent have been lodged with the

(Footnote cont'd on next page)

organization founded in 1981 and headquartered in Saint Louis, Missouri. Eagle Forum has repeatedly defended parents and families against governmental encroachment on parental rights and family autonomy. For the foregoing reasons, Eagle Forum has a direct and vital interest in the issues presented before this Court.

CONSTITUTIONAL BACKGROUND

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV. By its terms the Fourth Amendment applies only to the federal government, but the Fourteenth Amendment incorporates it to apply to the States. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

The Fifth Amendment's Due Process Clause provides that "No person shall ... deprived of life, liberty, or property, without due process of law." U.S.

(Footnote cont'd from previous page.)

Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

CONST. amend. V cl. 4. The Fourteenth Amendment's Due Process Clause applies this same protection of the people to State government. U.S. CONST. amend. XIV, §1, cl. 3. This liberty interest provides the procedural and substantive due-process protections for parents' control over the raising of their children, including – of course – custody over their children. *See, e.g., Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (striking state law requiring children to attend public schools as "interfer[ing] with the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Wisconsin v. Yoder*, 406 U.S. 205, 213-36 (1972) (exempting Amish children from compulsory school-attendance law because *inter alia* it impinges on the fundamental rights of parents with respect to religious upbringing of their children); *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 31-32 (1981) (parents have procedural due-process rights in state-initiated proceeding to terminate parental rights); *Santosky v. Kramer*, 455 U.S. 745, 754 (1982) (same).

STATEMENT OF FACTS

Respondent Greene prevailed in establishing that Petitioners Alford and Camreta (collectively, "Petitioners") violated the Fourth Amendment when they conducted a two-hour interview of Greene's nine-year-old daughter, S.G., in a closed conference room at S.G.'s public elementary school. Because Alford is a deputy sheriff and Camreta is a social worker in child-protective services, they argued their qualified immunity from damage claims. Viewing the Fourth Amendment's protections as insufficiently

established when Petitioners seized S.G., the Ninth Circuit found qualified immunity to apply.[2]

The facts here – and this Court's resolution of this case – fit within the larger societal context of the legal and administrative regimes that identify and prosecute child abuse. As the Ninth Circuit explained, only a quarter of the investigations conducted by state and local agencies concluded that the children in question were indeed victims of abuse. *Greene v. Camreta*, 588 F.3d 1011, 1015 (9th Cir. 2009) (*citing* U.S. Dep't of Health & Human Services, Admin. on Children, Youth & Families, *Child Maltreatment 2007* (2009)). This 3:1 discrepancy does not occur in a vacuum.

These investigations can have devastating stigmatic consequences for the children and parents. Here, the Greene family – which would have suffered financially from having Mr. Greene stay outside the home while Petitioners pursued their investigation – has been burdened by a criminal trial, as well as a civil claim brought all the way to this Court. As the Ninth Circuit explained, the 3:1 "discrepancy creates the risk that 'in the name of saving children from the harm that their parents and guardians are thought to pose, states ultimately cause more harm to many more children than they ever help.'" *Greene*, 588 F.3d at 1016 (*quoting* Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic*

---

[2] Petitioner Camreta's challenged post-seizure conduct is not at issue in this appeal.

Costs of a Child Welfare Exception to the Fourth Amendment, 47 WM. & MARY L. REV. 413, 417 (2005)).

Professor Coleman's immense and "ironic" costs – like the costs that Petitioners visited on the Greenes – trace back to the first child-protection organizations, chapters of the Society for the Prevention of Cruelty to Children ("SPCC"). The poor and immigrant communities that the SPCCs policed knew the SPCCs as "the Cruelty," because of their agents' reputations for engineering the removal of children from homes and families deemed undesirable, Timothy J. Gilfoyle, *The Moral Origins of Political Surveillance: The Preventive Society in New York City, 1867-1918*, 38 AMERICAN QUARTERLY 637-52 (1986), and, incidentally, tending to institutionalize them, rather than find new and better homes. JANE WALDFOGEL, THE FUTURE OF CHILD PROTECTION: HOW TO BREAK THE CYCLE OF ABUSE AND NEGLECT, at 71 (Harvard University Press 1998). From their inception, then, these child-protection services have presented an overzealous and unfair dark side that detracts from the good that they can accomplish. This case requires reconciling these issues with the Fourth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments.

SUMMARY OF ARGUMENT

The Fourth Amendment provides sufficient flexibility for Petitioners to accomplish their important functions, without violating the Fourth, Fifth, and Fourteenth Amendment rights of families through in-school seizures of minors in criminal

investigations. (Section I.A.) Moreover, the two-hour, closed-door hearing here cannot qualify as a "*Terry* stop" because it was too long, too custodial, and too intrusive, even for an adult and *a fortiorari* for a nine-year-old child. (Section I.B.) In any event, whether the Court analyzes seizure of S.G. under the traditional warrant exception in *Terry v. Ohio* or under Petitioners' proposals, the ultimate issue is the reasonableness of the seizure. A two-hour session behind closed doors in which the State – backed by a uniformed office with a visible firearm – repeatedly asks a nine-year-old child the same questions until she breaks down and gives the desired answers is unreasonable. (Sections I.B, II.D.)

Petitioners' attempt to extend general language from *Illinois v. Lidster*, 540 U.S. 419 (2004), to allow seizure of witnesses (*i.e.*, as distinct from suspects) misapplies the law of generalized police fact-finding of the public at large to the targeted, individualized seizure of S.G. For that reason, this Court must reject Petitioners' suggestion for a *per se* exception from traditional Fourth Amendment protections for the targeted seizure of witnesses. (Section II.B.) Similarly, and although it is certainly true that parents and their children have lower expectations of privacy at school than in the home, that does not mean that non-school branches of State government can invite themselves into schools to sidestep the public's protections from those non-school branches of the States. For that reason, this Court must reject Petitioners' suggestion for a *per se* exception to traditional Fourth Amendment protections for seizing minors in public schools. (Section II.C.)

ARGUMENT

I. THE FOURTH AMENDMENT REQUIRES A WARRANT OR WARRANT EXCEPTION TO SEIZE A MINOR CHILD IN A CRIMINAL INVESTIGATION

In "safeguard[ing] the privacy and security of individuals against arbitrary invasions by governmental officials," the Fourth Amendment is "basic to a free society" and inherent in ordered liberty. *Camara v. Municipal Court of City & County of San Francisco*, 387 U.S. 523, 528 (1967) (emphasis added, interior quotations omitted).

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.

Terry v. Ohio, 392 U.S. 1, 9 (1968) (internal quotations omitted). At the outset, therefore, it is clear that "[t]he Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." *U.S. v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (citing cases). The question is not *whether* the Fourth Amendment applies here, but *how* it applies on the facts of this case.

Even without competing constitutional interests, the Fourth Amendment's application presents difficult questions: "translation of the abstract prohibition against 'unreasonable searches and seizures' into workable guidelines for the decision of particular cases is a difficult task which has for

many years divided the members of this Court." *Camara*, 387 U.S. at 528. Here, however, the Court must address not only the Fourth Amendment's competing interests but also the degree to which the State's interests under the Fourth Amendment impede families' and parents' interests under the Due Process Clauses of the Fifth and Fourteenth Amendments. However true that may be when constitutional interests compete, it is especially true here where the State's involvement is more than three times more likely to harm than to help in any given intervention and seizure.

By way of background, the Fourth Amendment's last clause requires "probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized" in two types of government actions: (1) searches and seizures, and (2) warrants. U.S. CONST. amend. IV. The first type of action includes a "reasonableness" limitation on the "right of the people to be secure in their persons ... searches and seizures," whereas the second type is not limited by the constitutional text. *Id.* No one disputes that Petitioners seized S.G. without "probable cause," much less "probable cause, supported by Oath or affirmation." Therefore, Petitioners violated the Fourth Amendment unless (1) their actions fit into one of the existing Court-recognized exceptions, (2) the seizure was "reasonable" under *Terry v. Ohio*, 392 U.S. 1, 20 (1968), or (3) Petitioners convince this Court to create or expand an exception to apply here. As explained in Sections I.B and II.D, *infra*, the second and third options collapse into each other to

the extent that they rely on the same test for "reasonableness."

A. Existing Fourth-Amendment Flexibility Suffices for Seizing Minor Children in Criminal Investigations

This Court has recognized significant flexibility in the Fourth Amendment, including some criteria that potentially apply to child-abuse investigations in schools and some that do not.[3] Obviously, the Fourth Amendment would have allowed Petitioners to have proceeded with a warrant had they obtained one, with parental consent had they sought and received it, and in exigent circumstances if present. U.S. CONST. amend. IV; *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403-04 (2006) (discussing exigent-circumstance exceptions); *New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985) (parents, but not school officials, may consent to searches involving their children). Petitioners did not attempt to avail themselves of any of these courses.

---

[3] *See, e.g., U.S. v. Dionisio*, 410 U.S. 1, 9 (1973) (court-issued subpoena for witness to appeal before grand jury in criminal investigation); *New York v. Burger*, 482 U.S. 691, 716 & n.27 (1987) (administrative searches not used as pretext to enable law-enforcement officers to gather evidence of criminal violations); *Colorado v. Bertine*, 479 U.S. 367, 372 (1987) (standard administrative search of impounded vehicle's contents without bad faith or sole purpose of investigation).

Because Petitioners acted in a law-enforcement context, and because seizing S.G. far exceeded the *Terry* test for reasonableness, *see* Section I.B, *infra,* that would end the matter, even if this particular law-enforcement context did not involve something so harmful both to the children of *guilty* parents when the government is objectively right and to the *innocent* parents' Due Process rights when government is wrong. As indicated by the Ninth Circuit and in the Statement of the Facts, *supra,* the government is wrong far more often than it is right.

Rather than follow the three-part test that Petitioners propose, *see* Section II.D, *infra, amicus* Eagle Forum respectfully submits that the high false-positive error rate and the significant damage that those errors cause commend at least considering the three-part test from *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976), which *Lassiter* imported for due process in parental-rights *termination* proceedings:

> [1] the private interests affected by the proceeding; [2] the risk of error created by the State's chosen procedure; and [3] the countervailing governmental interest supporting use of the challenged procedure.

Santosky v. Kramer, 455 U.S. 745, 754 (1982) (*citing Mathews* and *Lassiter).* Significantly, unlike Petitioners' proposed balancing test, the *Mathews-Lassiter* test expressly includes consideration of the government's abject failure rate in this context. Before this Court even considers excepting the Fourth Amendment's protections of minor children from seizure in criminal investigations, the child-welfare industry needs to perform much better.

Given Petitioners' weak factual showing and the procedural setting here (namely, Petitioners have moved for summary judgment), this case does not present an opportunity for the Court to expand the rights of the government at the expense of parents.

B. The Petitioners' Seizure of S.G. Was Not Reasonable under *Terry*

In *Terry*, this Court determined that the Fourth Amendment allows an officer who has mere "reasonable suspicion" to detain someone briefly to confirm or alleviate the officer's suspicion. *Terry*, 392 U.S. at 16-19. When the *Terry* analysis applies, courts assess reasonableness under a three-part test: (1) "the gravity of the public concerns served by the seizure," (2) "the degree to which the seizure advances the public interest," and (3) "the severity of the interference with individual liberty." *Brown v. Texas*, 443 U.S. 47, 51 (1979). The *Mathews-Lassiter* "risk of-error" criterion fits squarely within both the second and third prongs this test. Whether this Court uses a balancing test or not, the framework that the Court adopts for seizures in the child-abuse context must fully consider the very real – indeed *likely* – prospect that the very act of Petitioners' intervening will cause more harm than good.[4]

---

[4] By its terms, the Fourth Amendment applies even when the risk of error is zero. The risk of error's relevance here is that Petitioners seek an exemption from the Fourth Amendment, based on factors that they attribute to the child-abuse context. If it

(Footnote cont'd on next page)

But the Court need not conduct the balancing here because Petitioners' two-hour, closed-door interrogation of a nine-year-old child, with a uniformed police officer's firearm visible, simply does not meet the contours of a *Terry* stop. Although this Court has "decline[d] to adopt any outside limitation for a permissible *Terry* stop," the Court has "never approved a seizure of the person for [a] prolonged 90-minute period." *U.S. v. Place*, 462 U.S. 696, 709-10 (1981). Here, Petitioners browbeat S.G. with the same questions, over and over again, until she told them what they wanted to hear.

Finally, because courts analyze Fourth Amendment issues under an objective standard, *City of Indianapolis v. Edmond*, 531 U.S. 32, 47 (2000), it is irrelevant that S.G. indicated that Deputy Alford made her feel comfortable. The relevant issue is that Petitioners (including an armed, uniformed policeman) detained S.G. for two hours of repeated questioning until she relented and gave them what they wanted to hear.

(Footnote cont'd from previous page.)

considers Petitioners' contextual arguments, the Court must consider the entire context. But even if the risk of error were zero in this context, law enforcement would have less intrusive means to accomplish its goals.

II. THE PETITIONERS' PROPOSED TESTS FOR "REASONABLENESS" CANNOT AND DO NOT JUSTIFY THE SEIZURE OF S.G.

Petitioners propose several alternate mechanisms for this Court to use in evaluating the seizure of minor children from school in criminal investigations of child abuse, outside the Fourth Amendment's traditional warrant and warrant-exception analysis. Although none of these alternate mechanisms are appropriate, all of them lead to essentially the same reasonableness test. *See* Alford Br. at 13-14; Camreta Br. at 17. As indicated in Section I.B, *supra*, Petitioners fail the *Terry* reasonableness test, which Petitioners acknowledge is comparable to the tests that they propose. *See* Section II.D, *infra*. Whether under the Constitution itself or the Constitution as they ask this Court to re-write it, therefore, Petitioners must fail.

A. The "Special Needs" Exceptions Do Not Apply to Criminal Investigations

Petitioners ask this Court to extend its "special needs" analysis from its historic non-criminal context to this criminal investigation. That is unprecedented:

> Only in those exceptional circumstances in which special needs, *beyond the normal need for law enforcement*, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.

T.L.O., 469 U.S. at 351 (Blackmun, J., concurring in the judgment). By definition, "special needs" are "beyond the normal need for law enforcement," *id.*, or even "divorced from the State's general interest in

law enforcement." *Ferguson v. City of Charleston*, 532 U.S. 67, 79 (2001); *see also T.L.O.*, 469 U.S. at 341, n.7 (distinguishing between searches "carried out by school authorities acting alone and on their own authority" and those conducted "in conjunction with or at the behest of law enforcement agencies").[5] This Court should reject Petitioners' invitation to extend special-needs analysis to searches and seizures in conjunction with criminal investigations.

B. *Lidster* Did Not – and this Court Should Not – Create a *Per Se* Fourth-Amendment Exception for Seizing Witnesses

In a tactic defeated by the very authority on which they rely, Petitioners ask this Court to allow their searches and seizures of witnesses – as distinct from suspects – based on general language in this Court's decision in *Illinois v. Lidster*, 540 U.S. 419 (2004). Because Petitioners' proposed *per se* "Witness Exception" does not comport with *Lidster* and offends the Fourth Amendment, this Court must reject it.

Lidster upheld the constitutionality of a police checkpoint established to enable police to ask motorists whether they had information about a fatal hit-and-run accident that had occurred around the same time roughly a week before. *Lidster*, 540 U.S. at 421-22. As a result of stopping Mr. Lidster's vehicle at this checkpoint, the police determined that

---

[5] Justice Blackmun's *T.L.O.* concurrence coined the term "special needs." *Ferguson*, 532 U.S. at 74.

Mr. Lidster was driving under the influence of alcohol and arrested him. *Lidster*, 540 U.S. at 422.

Petitioners rely on *Lidster* to suggest that the Fourth Amendment does not apply when the police seize witnesses to third-party wrongdoing:

> The checkpoint stop here differs significantly from that in *Edmond*. The stop's primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others.

Lidster, 540 U.S. at 423 (emphasis in original). "[A]n information-seeking stop is not the kind of event that involves suspicion, or lack of suspicion, of *the relevant individual*." *Lidster*, 540 U.S. at 424-25 (emphasis added). Despite its general language distinguishing witnesses from suspects, *Lidster* cannot carry the weight that Petitioners would place on it.

Lidster distinguished a prior checkpoint decision, *City of Indianapolis v. Edmond*, 531 U.S. 32, 41 (2000), which held that stops made "without individualized suspicion" for "crime control" purposes violate the Fourth Amendment. In doing so, the Court explained that courts cannot read general language in decisions to cover situations unlike the situation in the case underlying the decision:

> We must read this and related general language in *Edmond* as we often read general language in judicial opinions – as referring in context to circumstances similar

> to the circumstances then before the Court and not referring to quite different circumstances that the Court was not then considering.

Lidster, 540 U.S. at 424. The same general-language caution that *Lidster* used to distinguish *Edmond* easily distinguishes *Lidster* here. Petitioners' cannot extend general language from cases about checkpoints that stopped all passers-by indiscriminately to a case involving the targeted seizure of a single material witness.

In any event, the Fourth Amendment does not limit the scope of its protections only to suspects. U.S. CONST. amend. IV. To extend the preposterous analogy that Petitioner Camreta makes to guest lectures by non-school officials, Camreta Br. at 31, the *Lidster*-style exception could apply if Camreta gave a lecture on abuse to an auditorium full of students and, as part of that lecture, asked the students whether anyone had suffered abuse. But that is entirely different from the State's singling out a single student for confined questioning.

C. *T.L.O.* Did Not – and this Court Should Not – Create a *Per Se* Fourth-Amendment Exception for Seizing Minors in Public Schools

In a tactic analogous to the Central Intelligence Agency's alleged "extraordinary rendition" program, *see generally Mohamed v. Jeppesen Dataplan, Inc.*,

614 F.3d 1070, 1073-75 (9th Cir. 2010),[6] Petitioners argue that this Court should allow their criminal investigations to proceed *carte blanche* in public schools on the theory that the Fourth Amendment does not apply to schools under *T.L.O.* Because this argument does not comport with *T.L.O.* and offends the Fourth Amendment, this Court must reject it.

Schools exercise a "power [that] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995). "Thus, while children assuredly do not 'shed their constitutional rights ... at the schoolhouse gate,' the nature of those rights is what is appropriate for *children in school*." *Vernonia Sch. Dist.*, 515 U.S. at 655-56 (*quoting Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503, 506 (1969), alteration in original, emphasis added). That students "have been committed to the temporary custody of the State *as schoolmaster*," *Vernonia Sch. Dist.*, 515 U.S. at 654 (emphasis added), simply does not mean that students have been committed to that custody for all purposes.

In *T.L.O.*, a school administrator disciplining two students allegedly caught smoking in a lavatory found marijuana (as well as tobacco cigarettes) in

---

[6] Under the alleged rendition program, the Agency allegedly transfers foreign nationals from U.S. custody to the custody of governments for interrogation outside the Constitution's reach. *Id.*

one student's purse after she denied "smok[ing] at all." *T.L.O.*, 469 U.S. at 328. In determining that the warrant requirement did not apply, the Court balanced "the schoolchild's legitimate expectations of privacy" versus "the school's equally legitimate need to maintain an environment in which learning can take place." *T.L.O.*, 469 U.S. at 340. Nowhere did the Court sanction outside law-enforcement personnel to come on campus for targeted searches (much less seizures) in criminal investigations. Instead, the Court was concerned with the warrant requirement's "undu[e] interfere[nce] with the maintenance of the *swift and informal disciplinary procedures needed in the schools. Id.* (emphasis added). Accordingly, the "School Exception" under *T.L.O.* extends only to "search[s] of a student *by a teacher or other school official*" and, even then, only "when there are reasonable grounds for suspecting that the search will turn up evidence that *the student has violated or is violating* either the law or the rules of the school." *T.L.O.*, 469 U.S. at 341-42 (emphasis added). Neither situation applies here.

This Court should not sanction Petitioners' efforts to compel those who cannot afford private education to surrender their constitutional rights as a condition to receiving a free – albeit compulsory – public education:

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under

> the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold.

Frost v. Railroad Comm'n of State of California, 271 U.S. 583, 593-94 (1926).[7] Under *Frost*, the States cannot do indirectly what they cannot do directly.

D. The Seizure of S.G. Cannot Survive *Any* Framework Consistent with the Fourth Amendment

Even assuming *arguendo* that Petitioners can convince this Court to go beyond the probable-cause standard of the Fourth Amendment's warrant and warrant-exception analysis, Petitioners still cannot show that their seizing S.G. was reasonable: "What is reasonable, of course, depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, 619 (1989) (interior quotations omitted). Whichever test the Court uses to analyze the question, the bottom line will be the same answer reached under *Terry* in Section I.B, *supra*. By seizing S.G., Petitioners coerced a nine-year-old girl until she capitulated, telling the officers whatever they wanted to hear.

Petitioners propose the *Lidster* three-part test for assessing reasonableness: (1) "the gravity of the

---

[7] *Frost* prohibited the States' conditioning use of public roads on a private carrier's voluntarily submitting to otherwise-inapplicable regulation. 271 U.S. at 592-94.

public concerns served by the seizure," (2) "the degree to which the seizure advances the public interest," and (3) "the severity of the interference with individual liberty." Camreta Br. at 20 (*quoting Lidster*, 540 U.S. at 427 (*quoting Brown*, 443 U.S. at 51)); Alford Br. at 33 (same).[8] As indicated in Sections I.A and I.B, the Court's decisional framework must address the fact that the child-protection industry gets it wrong far more often than they get it right, with devastating consequences. If the Court uses the *Lidster* three-part test, it can and must consider these profound social costs in the second or third factors. Put simply, these seizures do not truly advance the public interest, and they interfere with far more than the individual liberty negated during the period of the seizure. Even under Petitioners' view of the law, then, Petitioners cannot prevail.

CONCLUSION

For the foregoing reasons and those argued by the Respondent, this Court should affirm the Ninth Circuit's decision with respect to the constitutional merits.

---

[8] The three-part test is the same under the *Terry* and special-needs modes of analysis.

Dated: January 31, 2011 Respectfully submitted,

LAWRENCE J. JOSEPH
1250 CONN. AVE. NW #200
WASHINGTON, DC 20036
(202) 669-5135
ljoseph@larryjoseph.com

Counsel for Amicus

No. 09-1454, 09-1478

In The Supreme Court of the United States

BOB CAMRETA, *Petitioner*,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, *Respondents*.

JAMES ALFORD, *Petitioner*,
DEPUTY SHERIFF, DESCHUTES COUNTY, OREGON

v.

SARAH GREENE, personally and as next friend for S.G., a minor, *Respondents*,

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE FAMILY DEFENSE CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

DIANE L. REDLEAF
Counsel of Record
Family Defense Center
725 S. Wells #702
Chicago IL 60607
312-356-3202 x11
diane@familydefensecenter.net
(Counsel for Amicus Curiae Family Defense Center)

TABLE OF CONTENTS

Page

Interests of Amici 1

Summary of Argument 2

Argument:

I. The State's interest lies in protecting children from genuine abuse, not in carrying out investigations in hundreds of thousands of unfounded cases 5

A. Over-reporting 8

B. Over-investigation, over-substantiation of meritless allegations and the high rate of error in substantiated findings 13

C. Poor Training of investigator, high caseloads, and high turnover 16

II. Child sexual abuse allegations are particularly prone to misreporting and mishandling 19

A. The problem of misreporting 19

B. Sexual abuse investigations often rely heavily on misinterpreted statements of children, and have given rise to poor investigative techniques 25

III. The allegations here are typical of unreliable allegations that harm children and families 29

Table of Contents—Continued Page

A. The hotline call as to S.G. was unreliable and unsubstantiated, giving rise to a deeply flawed investigation 29

B. The harm S.G. and her family experienced due to the flawed interrogation here is typical of disruption of family lives of victims and accused family members 31

IV. The State's interests do not overwhelm the balance of interests; adherence to the traditional Fourth Amendment requirements furthers the State's interests and protects children 34

Conclusion 37

TABLE OF AUTHORITIES

Cases: Page

Dupuy v. McDonald ("Dupuy I"), 141 F. Supp. 2d 1090 (N.D. Ill. 2001), *aff'd in relevant part*, 397 F. 3d 493 (7th Cir. 2005) 13, 14, 15, 17, 18, 24, 26, 34, 35

Dupuy v. Samuels ("Dupuy II"), 462 F. Supp. 2d 859 (N.D. Ill 2005), *nominally affirmed and remanded*, 465 F. 3d 757 (7th Cir. 2006) 11, 12, 12n.3, 23, 24, 25, 35

Finch v. N.Y. Office of Children and Family Servs., No. 04 Civ. 1668, 2008 U.S. LEXIS 103413 (S.D.N.Y. Dec. 19, 2008) 16

In re Gustavo H. and Krystal C., 841 N.E. 2d 50 (Ill. App. Ct. 2005) 10

Humphries v. Los Angeles County, 554 F. 3d 1170 (9th Cir 2009) 16

Morris v. Dearborn, 181 F. 3d 657 (5th Cir. 1999) 28

In re Nicholson, 181 F. Supp. 2d 182 (E.D.N.Y. 2002) 35

Nicholson v. Williams, 203 F. Supp. 2d 153, *aff'd sub nom Nicholson v. Scoppetta*, 344 F. 3d 154 (2d Cir. 2003) 35

Norman v. Johnson, 739 F. Supp. 1182 (N.D. Ill. 1990) 35

Cases—Continued: Page

People v. Assad, 189 Cal. App. 4th 187 (2010) 20 n.4

Santosky v. Kramer, 455 U.S. 745 (1982) 36

Terry v. Richardson, 346 F. 3d 781 (7th Cir. 2003) 26

In re T.W., 685 N.E. 2d 631 (Ill. App. Ct. 1997) 25

Valmonte v. Bane, 18 F. 3d 992 (2d Cir. 1994) 17

Wallis ex rel. Wallis v. Spencer, 202 F. 3d 1126 (9th Cir. 2000) 12, 13

Statutes and Regulations: Page

42 U.S.C. § 5101 *et seq.* 8

42 U.S.C. § 5106(a)(1)(E) 38

42 U.S.C. § 5106(a)(2) 15

42 U.S.C. § 5106(a)(2)(A) 8

45 C.F.R. § 1340.14(c) 8

ARK. CODE ANN. § 12-18-302(d) 11

CAL. PENAL CODE § 11166 9, 10

Cal. Penal Code § 11167(f) 11

FLA. STAT. § 39.201 9

ILL. ADMIN. CODE tit. 89, § 300, APP. B 22

325 ILL. COMP. STAT. 5/1 8

325 ILL. COMP. STAT. 5/4 9, 10

325 ILL. COMP. STAT. 5/5 9

Statutes and Regulations—Continued: Page

325 Ill. COMP. STAT. 5/7.14 15
325 Ill. COMP. STAT. 5/9 10
705 Ill. COMP. STAT. 405/2-3 21
L.A. COUNTY PROC. GUIDE § 0070-532.10 23
N.Y. SOC. SERV. LAWS § 413 9
OHIO REV. CODE ANN. § 2151.04 10
OHIO REV. CODE ANN. § 2151.421 9
OR. REV. STAT. § 419B.010 ..... 8, 9, 10
OR. REV. STAT. § 419B.030 15
23 PA. CONS. STAT. § 6311 9
S. D. CODIFIED LAWS § 26-8A-2 9
TEX. ADMIN. CODE § 700.501 23
TEX. FAM. CODE § 2411.1(E) 23

Miscellaneous: Page

William Bernet, *Case Study: Allegations of Abuse Created in a Single Interview*, 36 J. AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY 966-970, no.7 (1997) 28

Douglas J. Besharov, FIXING CHILD PROTECTION, PHILANTHROPY ROUNDTABLE (Jan. 1, 1998), *available at* http:www.welfareacademy.org/pubs/childwelfare/fixing_98.pdf 10, 19

Miscellaneous—Continued: Page

Douglas J. Besharov, *Right versus Rights, The Dilemma of Child Protection*, PUBLIC WELFARE (Spring 1985) 19, *available at* http://www.welfareacademy.org/pubs/legalrigtv rights_85.pdf 9

Douglas J. Besharov, *Unfounded Allegations: A New Child Abuse Problem*, 83 PUBLIC INTEREST 18-33 (1986) 34

DEIRDRE BROWN & MICHAEL LAMB, FORENSIC INTERVIEWS WITH CHILDREN: A TWO WAY STREET, *in* KATHRYN KUEHNLE & MARY CONNELL, THE EVALUATION OF CHILD SEXUAL ABUSE ALLEGATIONS: A COMPREHENSIVE GUIDE TO ASSESSMENT AND TESTIMONY 312 (John Wiley and Sons, 2009) 30

CASEY FAMILY PROGRAMS, AN ANALYSIS OF THE KANSAS AND FLORIDA PRIVATIZATION (April 2010) *available at* http://www.michfed.org/analysis_kansas_and_flori da_privatization_initiatives_2010 19

STEPHEN CECI & MAGGIE BRUCK, JEOPARDY IN THE COURTROOM (Am. Psych. Ass'n. 1995) 27

Council for American Private Education, Facts and Studies—Private School Statistics at a Glance, http://www.capenet.org/facts.html 7 n.2

Miscellaneous—Continued: Page

KATHLEEN FALLER, INTERVIEWING CHILDREN ABOUT SEXUAL ABUSE: CONTROVERSIES AND BEST PRACTICE 195 (Oxford Univ. Press 2007) 26

KATHLEEN FALLER, INTERVIEW STRUCTURE PROTOCOL AND GUIDELINES, *in* CHILD SEXUAL ABUSE: DISCLOSURE, DELAY AND DENIAL, 97-113 (Lawrence Erlbaum Assoc. Publ. 2007) 29

FAMILY DEFENSE CENTER, 2009 ANNUAL REPORT DOCKET 11-18, www.familydefensecenter.net 22

DAVID FINKELHOR ET AL., CRIMES AGAINST CHILDREN RESEARCH CTR., UNIV. OF N.H., UPDATED TRENDS IN CHILD MALTREATMENT 2009 (2010) http://www.unh.edu/ccrc/pdf/Updated_Trends_in_Child_Maltreatment_2009.pdf 6

Tonya Foreman & William Bernet, *A Misunderstanding Regarding the Duty to Report Suspected Abuse*, 5 CHILD MALTREATMENT 190, no. 2 (2000) 10, 18

FRONTLINE, *Prisoners of Silence*, (Oct. 19, 1993) *transcript available at* http://www.pbs.org/wgbh/pages/frontline/programs/transcripts/1202.htm 28

Miscellaneous—Continued: Page

FRONTLINE, *Child Welfare System FAQ*, http://www.pbs.org/wgbh/pages/frontline/shows/fostercare/inside/welfarefaq.html 18

IRIT HERSHKOWITZ ET AL., SUSPECTED VICTIMS OF ABUSE WHO DO NOT MAKE ALLEGATIONS: AN ANALYSIS OF THEIR INTERACTIONS WITH FORENSIC INTERVIEWERS, *in* CHILD SEXUAL ABUSE: DISCLOSURE, DELAY AND DENIAL, 97-113, (Lawrence Erlbaum Assoc. Publ. 2007) 29

Lina Leander, *Police Interviews with Child Sexual Abuse Victims: Patterns of Reporting, Avoidance and Denial*, 34 CHILD ABUSE AND NEGLECT, 192-205, no. 3 (Mar. 2010) 29

Kamala London, Maggie Bruck, et al., *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways Children Tell?* 11 PSYCHOL. PUB. POL'Y & LAW, 194-226, no. 1 (2005). 21, 29, 30, 38

Sabrina Luza & Enrique Ortiz, *The Dynamic of Shame in Interactions Between Child Protective Services and Families Falsely Accused of Child Abuse*, INST. PSYCHOL. THERAPIES J., 3 ISSUES IN CHILD ABUSE ACCUSATIONS no.2 (1991) *available at* http://www.ipt/forensics.com/journal/volume3/j3_2_5.htm. 34

Miscellaneous—Continued: Page

NAT'L COAL. FOR CHILD PROT. REFORM, ISSUE PAPER 6: CHILD ABUSE AND POVERTY, http://nccpr.org/reports/6Poverty.pdf 7

DEBRA POOLE & MICHAEL LAMB, INVESTIGATIVE INTERVIEWS OF CHILDREN, A GUIDE FOR HELPING PROFESSIONALS (Am. Psychol. Ass'n, 1998) 8, 13, 29

Karen Salekin, *The Suggestive Interview and the Taint Hearing: How Much is Too Much?*, 5 J. FORENSIC PSYCHOL. PRAC., 49-64, no.4 (2005). 27

Leroy Schultz, *One Hundred Cases of Unfounded Sexual Abuse: A Survey and Recommendation*, INST. PSYCHOL. THERAPIES J., 1 ISSUES IN CHILD ABUSE ACCUSATIONS no.1 (1989) *available at* http://www.ipt-forensics.com/journal/volume1/j1_1_4.htm 34

BRENDA SCOTT, OUT OF CONTROL: WHO'S WATCHING OUR CHILD PROTECTION AGENCIES? (Huntington House 1994) 19, 25

Dara Steele, *Expert Testimony: Seeking an Appropriate Admissibility Standard for Behavioral Science in Child Sexual Abuse Prosecutions*, 48 DUKE. L. J. 933 (1999). 38

Miscellaneous—Continued: Page

C. Stephenson, *When Family Fails: A Child's Stability, A Parent's Rights—Lives tipped upside down*, MILWAUKEE JOURNAL SENTINEL (Sept. 19, 2010) *available at* http:/www.jsonline.com/news/Milwaukee/103251879.html 18

U.S. DEP'T. OF HEALTH AND HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, CHILD MALTREATMENT 2008, http://www.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf (2009) 5, 7, 7 n.2, 8, 10, 11, 14, 15, 31

U.S. DEP'T. OF HEALTH AND HUMAN SVCS. INTERIM REPORT TO THE CONGRESS ON THE FEASIBILITY OF A NATIONAL CHILD ABUSE REGISTRY, at 2-3, 27-30 *available at* http://aspe.hhs.gov/hsp/09/childabuseregistryinterimreport/report.pdf (May 2009) 15, 16

U.S. DEP'T. OF HEALTH AND HUMAN SERVS., ADMIN FOR CHILDREN & FAMILIES, CHILD MALTREATMENT 2009, http://www.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf (2010) 6, 7 n.2, 16

Press Release, U.S. Dep't. of Health and Human Servs., Admin. for Children & Families, *available at* http://www.acf.hhs.gov/news/press/2011/decreased_child_abuse_neglect.html 6

MISCELLANEOUS—CONTINUED: PAGE

RICHARD WEXLER, WOUNDED INNOCENTS: THE REAL VICTIMS OF THE WAR AGAINST CHILD ABUSE 103 (Prometheus Books, 1990, 1995) 11, 25, 28

INTERESTS OF AMICI[1]

The Family Defense Center is a not-for-profit legal advocacy organization whose mission is to advocate justice for families in the child welfare system; its motto is: "To protect children, defend families." The Family Defense Center's founder and executive director, Diane L. Redleaf, is counsel for the amicus Family Defense Center. Ms. Redleaf, a leading child advocate and family rights lawyer for over 30 years, has litigated dozens of precedent-setting cases, including cases concerning children's rights to counsel, foster children's entitlements to foster care benefits, and family members' rights to due process in child abuse and neglect investigations. Ms. Redleaf founded the Center in 2005; in 2010, the Center received the first Excellent Emerging Organization Award of the Axelson Center for Non-profit Management for leadership in the field of child welfare law.

The Center's core practice area is legal representation of families involved in child protection investigations. The Center also works in the areas of policy advocacy, community legal education, and systemic reform litigation (including precedential appeals and civil rights cases). The Center supports the respondent mother and child in

---

[1] Pursuant to Sup. Ct. R. 37.6, *amicus curiae* certify that no counsel for a party to this action authored any part of this brief, nor did any person or entity, other than the *amicus*, its members, or its counsel make a monetary contribution to fund the preparation or submission of this brief.

this case based on its extensive work on behalf children and families who are subjected to traumatic investigations that harm children instead of protecting them.

SUMMARY OF ARGUMENT

The petitioners' briefs highlight the "epidemic" of child abuse in America, arguing that this epidemic and its consequences establish a compelling state interest that, they say, their in-school police/child protective services ("CPS") custodial interrogation policy furthers. Alford Br. 28-29, 36; Camreta Br. 11, 23-24. Preventing child abuse is, of course, a legitimate state concern. Child sexual abuse, in particular, harms its victims and causes the many consequences the petitioners cite. *Id.* But the State has no interest in conducting investigations *per se*; investigations merely are a means to fulfilling the goal of protecting children from abuse. Where no abuse is uncovered, investigations provide no benefit to the State, drain resources that could be better targeted to children in genuine need of protection, and cause unjustified harm to innocent children and families. In such cases, the State's purported justification for its actions as fulfilling the state interest in child protection fails. Because the overwhelming number of investigations would reap no benefit from the in-school police/CPS custodial interrogation policy and practice, or would be negatively affected by this policy and practice, this Court should reject the petitioners' pleas that such

interrogations are "reasonable at their inception." Camreta Br. 9-12, 18, 21, 34, 38, 45.

1. The statistics the petitioners and their amici cite in making a case for a compelling state interest, along with other evidence they omit, show a different epidemic—and in vastly greater numbers—than the one they describe: an epidemic of over-reporting, over-investigation, over-intrusion into children's and families' personal lives. This epidemic includes dramatically inflated but erroneous findings of child abuse or neglect. While child abuse is a serious problem, the actual numbers of school-aged children who are seriously abused and genuinely require State protection is a small fraction of the number of children swept into the child protection system each year. The harm to the children and families done by the system, in the name of protecting children from their parents, remains dramatically underreported but very significant. (Section I *infra*).

2. Examined dispassionately, child sexual abuse allegations are rife with the potential for misinterpretation, mistake and exaggeration. While sexual abuse is among the most serious of harms to children, child sexual abuse reports cover a huge gamut of conduct, from utterly heinous acts of violence to innocent or innocuous touching of a child by a parent or loved one. Child sexual abuse allegations are among the easiest to lodge and the hardest to disprove; these allegations are also particularly prone to abuse and misuse for ulterior

or misguided purposes. Contrary to petitioners' suggestion that there is a need for fast action to question children whenever a child sexual abuse allegation has been called in to a child abuse hotline ("Hotline"), Alford Br. 44, Camreta Br. 27, rushing to interview a possible child abuse victim can be the best recipe for a botched sexual abuse investigation. Indeed, experts on child sexual abuse caution a very different approach to eliciting children's statements than the petitioners espouse. (Section II *infra*).

3. The case of S.G. and her family typifies the epidemic of unproven and un-provable child abuse allegations that traumatize children, tear families apart and do not protect children in the process. The feared harm to S.G. and her sister—sexual abuse by their father—was not shown to have occurred, nor was there sufficient evidence to support the disruptive actions petitioners took in the name of protecting S.G. and her sister. Sarah Greene, S.G.'s mother, was also the victim of the State's coercive intervention; her custodial rights and her responsibilities to protect her child from harm were ignored even though she was never accused of harming her children. Yet, across America, allegations like those involving S.G., and many allegations that are even less plausible or suggestive of serious harm, have become the occasion for the most intrusive interventions and disruptions of family life. (Section III *infra*).

4. Contrary to petitioners' arguments, this Court should not endorse the policy petitioners seek

to ratify. The time-tested traditional Fourth Amendment protections should be respected in order to prevent unnecessary harm to children like S.G. and her family; these protections will also help to target precious and important resources to children who are true victims of abuse. (Section IV *infra*).

ARGUMENT

I. THE STATE'S INTEREST LIES IN PROTECTING CHILDREN FROM GENUINE ABUSE, NOT IN CARRYING OUT INVESTIGATIONS IN HUNDREDS OF THOUSANDS OF UNFOUNDED CASES

In support of their claim that the policies they seek to pursue further a compelling state interest, the petitioners cite 3.2 million Hotline calls per year, concerning nearly 6 million children. Alford Br. 29; *see* Camreta Br.11. They acknowledge, however, that 690,061 children—just over 10% of the total potential victims—are "substantiated" victims of abuse or neglect. U.S. DEP'T. OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, CHILD MALTREATMENT 2008 25 http://www.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf ("2008 CHILD MALTREATMENT") (2009). This number represents approximately 1% of the children in the United States. *Id.* The overwhelming majority of Hotline calls and investigations are determined to be "unfounded" or "unsubstantiated." 2008 CHILD MALTREATMENT, *supra*, at 8. Moreover, the 2009

Department of Health and Human Services report shows decreases in the numbers of substantiated alleged victims for the third consecutive year. Press Release, U.S. Dep't. of Health & Human Servs., Admin. for Children & Families, Report Shows Steady Decrease in Child Abuse and Neglect, *available at* http://www.acf.hhs.gov/news/press/2011/ decreased_child_abuse_neglect.html; *see also* U.S. DEP'T. OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, CHILD MALTREATMENT 2009, http://www.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf ("2009 Child Maltreatment") 35 (2010). Substantiated sexual abuse has declined 5% since 2008. DAVID FINKELHOR ET AL., CRIMES AGAINST CHILDREN RESEARCH CTR., UNIV. OF N.H., UPDATED TRENDS IN CHILD MALTREATMENT 2009 (2010),http://www.unh.edu/ccrc/pdf/Updated_Trends_in_Child_Maltreatment_2009.pdf. Of course, not all of these children are alleged victims of *parental* abuse or neglect; many children are allegedly mistreated in child care settings, including foster care. *Id.* at 28.

In determining how child seizures in public schools further the State's interest in protecting children from abuse, these overall statistics bear closer examination, as do the reasons for the very high numbers of unsubstantiated cases. Indeed, a deeper understanding of child protection investiga-

tions is necessary to avoid causing more harm than good for children by expanding the powers of police and CPS investigators.[2]

While labeled an epidemic, specific forms of maltreatment have a true incidence rate that is, at best, difficult to discern from available data and the actual number of real abuse victims is lower than appears. For starters, 73.3% of "substantiated" allegations concern "neglect" or "medical neglect," not abuse. 2008 CHILD MALTREATMENT, *supra*, at 26. Neglect includes dirty homes and lack of childcare. *See* NAT'L COAL. FOR CHILD PROT. REFORM, ISSUE

---

[2] A large percentage of child abuse cases involve children who are younger than nine—S.G.'s age; many involve children under the age of public school attendance. 2008 Child Maltreatment, *supra*, at 25 (showing children eight and older are 43.3% of the alleged victims; 32.6% of alleged victims are zero to three). An estimated six million children attend private schools. Council for American Private Education, Facts and Studies—Private School Statistics at a Glance, http://www.capenet.org/facts.html (last visited Jan. 21, 2011). The most serious abuse—child abuse fatalities—disproportionately involve very young children (80.8% of child abuse deaths reported in 2009 involved children younger than four). 2009 CHILD MALTREATMENT, *supra*, at 55, 61, tbl. 4.3, fig. 4.1. Indeed, infants have by far the highest child abuse death rate, with 46.2% of child abuse fatalities occurring to children younger than one year old. *See* 2008 CHILD MALTREATMENT, *supra*, at 56 (citing similar statistics). The size of the universe of children potentially aided by child protection investigations conducted in public school buildings is thus much smaller than the overall child abuse victim numbers would suggest and the policy of school-based interrogations will have little or no impact on the most serious of the child abuse cases—fatalities.

PAPER 6: CHILD ABUSE AND POVERTY, http://nccpr.org/reports/6Poverty.pdf. Other forms of physical abuse constitute the next largest category of reports (16.1%); only 9.1% of the total number of substantiated harms involve sexual abuse. 2008 CHILD MALTREATMENT, *supra*, at 26.

There are three separate, interrelated causes for the high rate of unsubstantiated cases. A discussion of these causes demonstrates why the balance of harms involved in this case is quite different than those the petitioners describe:

a. Over-reporting. Efforts to enact child abuse reporting laws in the United States began in earnest with a 1961 symposium on child abuse convened by Dr. C. Henry Kempe. DEBRA POOLE & MICHAEL LAMB, INVESTIGATIVE INTERVIEWS OF CHILDREN, A GUIDE FOR HELPING PROFESSIONALS (Am. Psychol. Ass'n, 1998). In 1973, these efforts culminated in the passage of the Child Abuse Prevention and Treatment Act ("CAPTA"), codified at 42 U.S.C. §§ 5101 *et seq.* (2010). Pursuant to CAPTA, as amended by the Keeping Children and Families Safe Act of 2003, states receive federal funding to administer child abuse hotlines and administrative registers of substantiated child abuse findings. 42 U.S.C § 5106(a)(2)(A). CAPTA requires states to have systems for receiving reports of suspected child abuse. *Id.*; 45 C.F.R § 1340.14 (c). State reporting statutes implement CAPTA's requirements. *See, e.g.*, OR. REV. STAT. § 419B.010 (2009), 325 ILL. COMP. STAT. 5/1 *et seq.* (2011).

Child "neglect" is included in what must be reported to child protective authorities. *See, e.g.*, CAL. PENAL CODE § 11166 (2010); FLA. STAT. § 39.201 (2010); 325 ILL. COMP. STAT. 5/5 *et seq.*; N.Y. SOC. SERV. LAW § 413 (2011); OHIO REV. CODE ANN. § 2151.421 (LexisNexis 2010). Persons who must report suspected abuse or neglect include virtually all persons who come into contact with children in the course of their work, from teachers and police to animal control officers and acupuncturists. *See* 325 ILL. COMP. STAT. 5/4 (Illinois law including the latter two categories). Only attorneys and clergy are typically exempt from the duty to make a Hotline call when they believe child abuse may have occurred. *See, e.g.*, 23 PA. CONS. STAT. § 6311 (2010). Oregon is unusual insofar as it exempts psychiatrists and psychologists from its reporting law. OR. REV. STAT. § 419B.010.

What is to be reported as child abuse or neglect varies from state to state, however, because there is no uniform definition of abuse or neglect. The laws defining child abuse and neglect "set no limits on intervention and provide no guidelines for decision making. They are a prime reason for the system's inability to protect obviously endangered children, even as it intervenes in family life on a massive scale." Douglas J. Besharov, *Right Versus Rights: The Dilemma of Child Protection*, PUB. WELFARE 19 (Spring 1985), *available at* http://www.welfareacademy.org/pubs/legal/rightvrights_85.pdf. *See, e.g.*, S. D. CODIFIED LAWS §§ 26-8A-2 (2010) (child's "environment is injurious to his

welfare"); OHIO REV. CODE ANN. § 2151.04 (child's "condition or environment . . . warrant the state in the interests of the child, in assuming his guardianship"). Appellate court pronouncements typically provide little helpful guidance as to what parental conduct might potentially be found deficient. *See, e.g., In re Gustavo H. and Krystal C.*, 841 N.E. 2d 50, 59 (Ill. App. Ct. 2005) (stating only that "neglect is a failure to exercise the care that the circumstances justly deserve and can be either willful or an unintentional disregard of parental duty").

Not only is the conduct or harm to be reported very broadly defined in reporting laws potentially to include all children who might be found to be victims of abuse upon investigation, but the threshold standard for child abuse reporting is deliberately very expansive as well. Abuse or neglect is to be "reasonably suspected" or "reasonably believed" under a subjective "good faith" belief standard. CAL. PENAL CODE § 11166 ("reason to suspect"); OR. REV. STAT. § 419B.010; 325 ILL. COMP. STAT. 5/4 (reasonable cause to believe); *id.* at § 5/9 (granting good faith immunity for reporter); Tonya Foreman & William Bernet, *A Misunderstanding Regarding the Duty to Report Suspected Abuse*, 5 CHILD MALTREATMENT 190, 193, no. 2 (2000). The "combination of immunities and penalties encourages the over reporting of questionable situations." DOUGLAS J. BESHAROV, FIXING CHILD PROTECTION, PHILANTHROPY ROUNDTABLE (Jan. 1, 1998) *available at* http://www.welfareacademy.org/

pubs/childwelfare/fixing_98.pdf. As result, child abuse or neglect calls are oftentimes made to Hotlines even when the child abuse reporter has doubts as to whether abuse or neglect actually occurred. This rampant reporting of abuse or neglect is justified in training and philosophy as "erring on the side of the child." RICHARD WEXLER, WOUNDED INNOCENTS: THE REAL VICTIMS OF THE WAR AGAINST CHILD ABUSE 103 (Prometheus Books, 1990, 1995).Unfortunately, massive unsubstantiated reporting ends up erring only on "error's side;" it does not benefit children.

While most Hotline calls (57.9% in FFY 2008) come from mandated child abuse reporters, hundreds of thousands do not. 2008 CHILD MALTREATMENT, *supra*, at 6. Persons who see a child in public or who know of a child through personal acquaintance, including contending parties in family disputes, make hundreds of thousands of Hotline calls. Some do so anonymously, 2008 CHILD MALTREATMENT, *supra*, at 6; most states do not forbid anonymous calls and some expressly allow such reports. *See, e.g.*, ARK. CODE ANN. § 12-18-302(d) (2010); CAL. PENAL CODE § 11167(f).

Many investigations intrude deeply into family life without any threshold reliability determination as to the credibility of the reporter. For example, the Redlin family, plaintiffs in *Dupuy v. Samuels*, 462 F. Supp. 2d 859, 873 (N.D. Ill. 2005) ("*Dupuy II*"), *nominally affirmed and remanded*, 465 F. 3d 757 (7th Cir. 2006), *appeal after remand*, 495

F.3d 807 (7th Cir. 2007), *cert. denied*, 554 U.S. 902 (2008), were victimized by an unidentified Metra train rider's report.[3] That rider's report to Metra police was relayed to Illinois child protection authorities ("DCFS") who then investigated whether James Redlin's tickling of his 6-year-old son Joey (during a father-son trip to Chicago's Field Museum), constituted sexual abuse. *Id.* Joey had special needs, and the Redlins had been encouraged to use more tactile contact with him, as James had been doing. *Id.* This report led to months of intrusive restrictions on the James's unsupervised contact with his son, until the allegations were "unfounded." *Id.* In another *Dupuy II* class member's case, an anonymous neighbor caused criminal and child protection investigations of Prof. S. for alleged sexual abuse of his 8-year-old daughter that the neighbor claimed to have seen through a window; DCFS demanded that he leave his home pending further investigation, though the allegation was eventually deemed unfounded after Prof. S.'s daughter denied abuse at a Child Advocacy Center interview. 462 F. Supp. 2d. at 880-81. In the notorious case *Wallis ex rel. Wallis v. Spencer*, 202 F. 3d 1126 (9th Cir. 2000), the Hotline call source was a

---

[3] The Seventh Circuit Court of Appeals in *Dupuy II* found that the demand that families like the Redlins sign safety plans, upon the representation that their failure to do so would cause their children to be taken into foster care, did not deprive them of a liberty interest on the ground that the safety plan form stated their decision was "voluntary." *Dupuy v. Samuels*, 465 F.3d 757, 762-63 (7th Cir. 2006). None of the district court's findings of fact were overturned by the Seventh Circuit.

mentally ill (multiple personality-disordered) relative of the alleged child victim who claimed her nephew was going to be ritually slaughtered; this call was not summarily dismissed as a lunatic raving in part because the mandated Hotline caller, a therapist, had some "expertise" in ritual abuse. 202 F.3d at 1133.

Hotline calls are made for all sorts of reasons, including retaliation and secondary gain. For example, *Dupuy I* class member Pearce Konold, a licensed social worker at a children's residential facility, was accused of allowing sexual abuse to occur in the boy's cottage he supervised when one of the employees he supervised attempted to shift blame away from himself. *Dupuy v. McDonald* ("*Dupuy I*"), 141 F. Supp. 2d 1090, 1119-1124 (N.D. Ill. 2001), *aff'd in relevant part*, 397 F. 3d 493 (7th Cir. 2005). In another *Dupuy I* class member's case, two Hotline calls were made against day care home owners M.K. and her husband R.K., first by the mother of a day care child after M.K. had complained about the child's poor hygiene, and then by a delivery man after R.K. refused charges for a package. *Id.* at 1125-26. Hotline calls made by contending parties to custody battles are made at six times the rate of average reporting. POOLE & LAMB, *supra*, at 18. Because the *bona fides* of the Hotline caller are generally *not* investigated before their calls are coded and sent to investigators for follow-up, *Dupuy I*, 141 F. Supp. 2d at 1095, a substantial number of calls that get investigated are ones in which the Hotline stands to benefit from child

protection system intervention against another parent or caregiver for a child.

b. Over-investigation, over-substantiation of meritless allegations and the high rate of error in substantiated findings. Amicus Attorneys General contend that the numbers of child abuse reports sent for investigation are not as inflated as the court of appeals stated, because 37.5 % of Hotline calls are "screened out." 2008 CHILD MALTREATMENT, *supra*, at 6; Attorneys General Br. 16-17. "Screening out" does occur, but screening for merit is not generally involved in this screening out process. For example, the federal court in *Dupuy I* found the screening of Hotline calls to be quite minimal: if the allegations concern a child under 18 and fit within a defined category in the state child protection system, the case is sent for investigation. 141 F. Supp. 2d at 1095.

Unlike police investigators who make no determinations of guilt or innocence, child protective services investigators make administrative findings that register individuals as responsible for abuse or neglect. *Dupuy I*, 141 F. Supp. 2d at 1096 (describing decision to "indicate" a report and cause its registry); 2008 CHILD MALTREATMENT, *supra*, at 7. In some states, the findings are called "substantiated"; in others they are called "indicated" (*e.g.*, New York and Illinois use the term "indicated" refer to "substantiated"). The amount and nature of evidence needed to substantiate a finding of abuse may be open-ended. *Dupuy I*, 141 F. Supp. 2d at

1096-97. Once substantiated, the results (*i.e.*, the names of the persons found responsible for abuse) are maintained in the state's child abuse register. *Id.* at 1099; *see* 42 U.S.C. § 5106(a)(2); *see also* 325 ILL. COMP. STAT. 5/7.14. The "substantiated" abuse and neglect numbers petitioners cite in their claims of a child abuse epidemic derive from these state child abuse registers. The numbers of real abuse or neglect cases as shown by the "substantiation" label are, however, themselves grossly unreliable.

One reason for the unreliability of the reported numbers of substantiated cases is that investigations of child abuse and neglect do not adhere to consistent standards for the assessment of evidence. Many state registers allow substantiation upon a finding of "credible evidence." *See, e.g.*, OR. REV. STAT. § 419B.030; 2008 CHILD MALTREATMENT, *supra*, at 7 (deferring to state policy for definitions of evidentiary burden to substantiate abuse); *see, e.g.*, *id.* at 154-56 (Idaho, Illinois and Indiana each use "credible evidence" standard to substantiate), *id.* at 141 (Arizona uses "probable cause" standard), *id.* at 150 (Florida uses "some substantiation" based on "credible evidence"). In practice, the already-low standard of "credible evidence" is "practically nominal" evidence. *Dupuy I*, 141 F. Supp. 2d at 1140. Indeed, inconsistent and often very low standards of evidence are a reason a national child abuse registry is considered not to be feasible. *See*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., INTERIM REPORT TO THE CONGRESS ON THE FEASIBILITY OF A NATIONAL

CHILD ABUSE REGISTRY, at 2-3, 27-30 *available at* http://aspe.hhs.gov/hsp/09/childabuseregistryinterim report/report.pdf (May 2009) (noting due process problems related to varying levels of substantiation evidence, lack of prior notice on some states, non-existent or flawed expungement procedures, and the high error rate in the registries). The report states that only 29 states have "strong legal standards" (*i.e.*, either a preponderance or clear and convincing standard), *id.* at 28, and notes that expungement procedures have "been a perpetual weakness," *id.* at 29, with only half the states providing appeals in state law. *Id.* 2009 Child Maltreatment, *supra*, confirms wide variation in substantiation rates amongst states (*e.g.*, Georgia and Massachusetts, substantiate over 55% of their investigations, while Arizona and Kansas (the only state with a "clear and convincing" standard of evidence), substantiate fewer than than 10% of their investigations). 2009 CHILD MALTREATMENT, *supra*, at 28, 159.

Some states, including California, still lack an effective means for persons named as perpetrators of abuse or neglect in an indicated finding to secure a neutral review of the basis for their inclusion in the Register. *See Humphries v. Los Angeles County*, 554 F. 3d 1170, 1201 (9th Cir. 2009), *rev'd in part on other grounds*, 131 S. Ct. 447 (2010) (remanding as to type of hearing required to afford due process). In *Finch v. N.Y. Office of Children and Family Servs.*, No. 04 Civ. 1668, 2008 U.S. LEXIS 103413 (S.D.N.Y. Dec., 19, 2008), 25,000 individuals whose appeal requests New York's Office of Child and Family

Services had destroyed successfully sued and were allowed to re-file and pursue their appeals years after being indicated for abuse or neglect. The lack of an effective means to appeal the decision to put an individual's name in the register for child abuse or neglect means that many of the hundreds of thousands of "substantiated" findings of maltreatment have not been verified by an impartial magistrate, or any neutral person for that matter.

When the validity of so-called substantiated or indicated findings *has* been subjected to such review through appeals by persons named in child abuse investigations, their rates of error have been found to be "staggering." *Dupuy I*, 141 F. Supp. 2d at 1136. Specifically, the district court in *Dupuy I* noted that the plaintiffs had established that 74.5% of indicated reports that were appealed were eventually overturned by either voluntary withdrawal of the findings by DCFS counsel or after hearings on the merits by its administrative law judges based on a "preponderance of the evidence" burden of proof for the state. *Dupuy I*, 141 F. Supp. 2d at 1102. In *Valmonte v. Bane*, the court of appeals found a nearly-identical reversal rate—75%—and determined that New York State's "some credible evidence" standard created an "unacceptably high risk of error." 18 F.3d 992, 1004 (2d Cir. 1994).

c. Poor training of investigators, high caseloads, and high turnover. In addition to operating under the open-ended, discretionary and error-prone standards described above, investigators

themselves often lack sufficient education or training to undertake the complex task of distinguishing childhood accidents from child abuse or determining if a particular touch by a parent or caregiver was innocent or sexual in nature. For example, in Illinois, to be an investigator requires only a Bachelor's degree and two years of social service or law enforcement experience, but requires no degree or experience in child development. *Dupuy I*, 141 F. Supp. 2d at 1094. Thereafter, investigators receive two weeks (49.45 hours) of specialized training in addition to the five weeks of basic child welfare agency training for all casework, licensing, and core agency staff. *Id.* Apparently, however, even these relatively modest credentialing and training requirements put Illinois far ahead of many other jurisdictions. *See also* FRONTLINE, *Child Welfare System FAQ*, http://www.pbs.org/wgbh/pages/frontline/shows/fostercare/inside/welfarefaq.html (citing caseworker educational credential data; also citing states that provide "one day's to several days' worth" of on-the-job training).

Caseloads for investigators are also very high, in part because "child protective agencies are increasingly overwhelmed with reports that must be addressed by inadequate numbers of staff." Foreman & Bernet, *supra*, at 195. Turnover in investigative staff is, and historically has been, extremely high. C. Stephenson, *When Family Fails: A Child's Stability, A Parent's Rights--Lives tipped upside down*, MILWAUKEE JOURNAL SENTINEL (Sept. 19, 2010) *available at* http://www.jsonline.com/news/milwau-

kee/103251879.html (citing HHS Child Welfare Information Gateway as providing estimates of national turnover between 30% and 40% a year). Burnout is a major cause of turnover. CASEY FAMILY PROGRAMS, AN ANALYSIS OF THE KANSAS AND FLORIDA PRIVATIZATION 14 (Apr. 2010) *available at* http://www.michfed.org/analysis_kansas_and_florida_privatization_initiatives_april_2010 (also noting rates of 50% turnover in some agencies following). These realities mean that child protection systems effectively allow inexperienced college graduates with no specialized child development training to determine such questions as whether a parent's tickling their child constitutes sexual abuse; such a determination against a parent adds another child sexual abuse statistic to the child maltreatment count that HHS reports. It also sets in motion a host of harms to families. *See generally*, BRENDA SCOTT, OUT OF CONTROL: WHO'S WATCHING OUR CHILD PROTECTION AGENCIES? (Huntington House, 1994) (documenting numerous insubstantial allegations that were poorly investigated, resulting in erroneous findings of abuse).

Poorly trained, unskilled, and unsophisticated investigators' failures to distinguish true abuse from innocuous behavior sometimes result in tragic harm to children who are abused while these investigators devote energy and resources on cases of those who are not abused. *See* BESHAROV, FIXING CHILD PROTECTION, *supra*, at 2. While cases involving innocuous touching, such as tickling a child on a train ride, *see supra* p. 11, consume

precious law enforcement and child protection resources, genuinely abused children do not receive the attention their dangerous situations require. [4]

In sum, while there may be an epidemic of child abuse and neglect in America, the available evidence drawn from the overall maltreatment statistics and the procedures through which the statistics come to be reported to child protection authorities, give ample ground for concluding that the reported epidemic is exaggerated or uncertain. The number of children who are real victims of parental abuse may be dramatically lower than the petitioners claim. As discussed below, this point is especially true for sexual abuse allegations.

---

[4] The gruesome case of *People v. Assad*, 189 Cal. App. 4th 187 (2010), California State Ass'n. of Counties Br. 28-32, and several cases cited by the Office of the Public Guardian as illustrative of the need for a relaxed "reasonableness" standard, Br. 2-6, 14, 23, all exemplify cases in which a court has found probable cause. With few exceptions, these cases also presented ample physical evidence or parental admissions *prior to* a school interview. Three of the four Public Guardian examples, moreover, originated with a direct complaint by the child to 911, a trusted friend, or a teacher. *Id.* Interestingly, in the *Assad* case, the in-school interview itself elicited no inculpatory statements from the child himself against his father.

II. CHILD SEXUAL ABUSE ALLEGATIONS ARE PARTICULARLY PRONE TO MISREPORTING AND MISHANDLING

A. The Problem of Misreporting

The area of child sexual abuse is particularly susceptible to the problems of over-reporting and over-finding of abuse that are prevalent in the child abuse investigation system as a whole, *see Section I. supra.* Indeed, there is a general lack of data as to how many children are victims of sexual abuse; the "accuracy of a diagnosis of child sexual abuse is often difficult because definitive medical or physical evidence is lacking or inconclusive in the vast majority of cases and because there are no gold standard psychological symptoms specific to sexual abuse." Kamala London, Maggie Bruck, *et al.*, *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways Children Tell?* 11 PSYCHOL. PUB. POL'Y & LAW, 194-226, no. 1 (2005). Contributing to these inaccuracies in the reported numbers is a host of sloppy or damaging practices and wrongful beliefs that have permeated the child sexual abuse investigation field.

"Sexual abuse" is a huge category that encompasses many forms of interactions between children and caregivers, family members, and relatives. The conduct that could be labeled "sexual abuse" ranges from horrific to innocuous, or even salutary (as in the Redlin case, p. 11 *supra*). Child

sexual abuse definitions are often borrowed directly from criminal law, *see, e.g.*, 705 ILL. COMP. STAT. 405/2-3 (defining a "sexually abused child" as one whose "parent or immediate family member . . . or person who is in the same family or household as the minor" "commits or allows to be committed any sex offense against such minor, as such offenses are defined in the Criminal Code . . . "). Child protection agencies and juvenile courts extend the sweep of such offenses, however, to persons (often another parent or family member) who allegedly allow the offense and do not employ the same *mens rea* requirements as criminal proceedings.

Illinois' child protective services agency, for example, has a broad category called "substantial risk of sexual harm," defined as the creation of a "real and significant danger of abuse" when an "indicated, registered or convicted sex offender resides in the home of a child and the extent/quality of supervision . . . is unknown or suspected to be deficient." 89 ILL. ADMIN. CODE 300, APP. B. Allegation 22 Definition, *available at* http://www.state.il.us/dcfs/docs/300.pdf. Illinois also defines the very serious allegation "sexual penetration" counter-intuitively, to include digital touching (fondling) and requires no evidence of sexual intent or sexual gratification by the perpetrator to indicate the allegation. *Id.* (Allegation 19 Definition). Sexual conduct between two teenagers, who may be step-siblings or cousins, can be reported to child abuse authorities as child sexual abuse for which a parent is held responsible. *See* FAMILY DEFENSE CENTER,

2009 ANNUAL REPORT DOCKET 11-18, *available at* www.familydefensecenter.net (documenting five recently litigated cases of alleged siblings, step-siblings or cousins accused of sexual abuse). Rules and policies defining sexual abuse offenses in many states are similar. *See, e.g.*, L.A. COUNTY PROC. GUIDE § 0070-532.10 (Apr. 2007) (defining "sexual assault" as "any intrusion by one person into the genitals or anal opening of another person" (no sexual intent finding required); TEX. FAM. CODE § 2411.1(E) (2002) (defining "sexual abuse" as "sexual conduct harmful to a child's mental, emotional, or physical welfare"); TEX. ADMIN. CODE § 700.501 (1996) (stating that "compelling or encouraging the child to engage in sexual conduct" is met "whether the child actually engages in sexual conduct or simply faces a substantial risk of doing so").

Moreover, children can misinterpret many types of innocent touching as wrongful, or make statements that are misunderstood; these statements in turn can become the basis for a Hotline call. For example, a 4-year-old's statement to her mother that the "boy teacher" had "touched her pee-pee" led to an "indicated" finding that Patrick D. had sexually molested the child; an eventual neutral review showed the touching was no more than a routine backrub given to the child at naptime in a full classroom of 4-year-olds. *Dupuy II*, 462 F. Supp. 2d at 876. Even though Patrick's three children denied ever having been touched inappropriately, child protection investigators demanded that he leave his home. An

administrative law judge later faulted the investigators for an investigation that was "at a minimum sloppy" for, *inter alia*, failing to interview Patrick's co-teachers to learn about the naptime backrub practice. *Id.* at 877. While the DCFS administrative appeal process eventually exonerated him, Patrick's entire family was torn apart for 11 months due to the misinterpreted statements of the 4-year-old day care child. *Id.*

In another *Dupuy I* class member's case, a 3-year-old day care child said that the day care owner's 16-year-old son made her "lick his tooney;" this allegation apparently followed an episode in which the little girl had walked in on the boy in the bathroom. This allegation, investigated by police and child protective services as well as day care licensing authorities, resulted in the 16-year-old boy's ouster from his own home during day care hours, and the boy was arrested, though never convicted. DCFS investigators found the girl's allegations "credible" and "indicated" the boy for sexual molestation, despite suggestive questioning of the child, inconsistencies in her statements, and denial of the likelihood of abuse by numerous adults, including the alleged victim's mother. *Dupuy I*, 141 F. Supp. 2d at 1128-29. The indicated finding against the boy was eventually expunged on the grounds that he had not been afforded due process. *Id.* *Dupuy II* plaintiff Jimmie Parikh was accused of kissing 11-year-old Deana, the daughter of a family acquaintance whose own mother considered her a "liar"; even though no adults who were questioned

believed the allegations, child protection and police authorities were contacted and Jimmie was required to leave his home during the weeks-long investigation. *Dupuy II*, 462 F. Supp. 2d at 877-878.

These cases demonstrate the ease with which dubious, even far-fetched, sexual abuse claims are accepted by child abuse Hotlines and subjected to full, intrusive investigations, causing serious disruptions in children's and families lives. *See generally* SCOTT, *supra*; WEXLER, *supra* (each detailing dozens of similar cases as exemplifying "out of control" CPS investigations).

In the cases described above, the alleged perpetrators were much older than the alleged victims. But child sexual abuse allegations may involve alleged touching of one child by another child of a similar age. It thus is not accurate to say, as Petitioner Alford does, that all child sexual abuse investigations "of this type," Alford Br. 39 (heading B), concern only children who are interviewed in their capacity as a "victim" for their own protection, *id.* at 31, 39, rather than as a potential perpetrator. *See, e.g., In re T.W.*, 685 N.E. 2d 631, 635 (Ill. App. Ct. 1997) (applying sexual abuse law to both participants in consensual sex between minors). A child who had engaged in sexual activity could reasonably be concerned about her own potential culpability, regardless of how the initial triggering call to authorities was framed or who had been named in the call as a perpetrator.

Foster children who have been sexually abused prior to coming into foster care sometimes act out with each other sexually at a young age, and make accusations against their substitute care providers in an effort to gain control of their own placements. For example, 5- and 7-year-old girls placed with foster mother R.F. were violent with each other and eventually, months after being removed from her home, they leveled accusations against R.F.'s son for allegedly sexually abusing them, even though one of the children had lodged objects in her own vagina. *Dupuy*, 141 F. Supp. 2d at 1110, 1115-1117. These same children's accusations were deemed "not credible" after a Child Advocacy Center interview.

Sexual abuse claims have escalated in the past two decades in divorce/custody actions, with allegations of sexual abuse commonly used to secure custody or to block a former spouse partner from access to children. KATHLEEN FALLER, INTERVIEWING CHILDREN ABOUT SEXUAL ABUSE: CONTROVERSIES AND BEST PRACTICE 195 (Oxford Univ. Press 2007). In *Terry v. Richardson*, for example, John Terry's ex-wife, Richelle, reported to DCFS her daughter's claim that John had kissed her "pee-pee," forced her to swallow a necklace and tried to make her kiss his "noodle." After the mother made the Hotline call, DCFS directed John to cease visitation with his daughter. A family court judge eventually cleared him, finding his daughter had been sexually abused, but "not by him." In the meantime, however, Richelle secured unfettered access to her daughter and John, a wrongly-accused

father, lost contact with his daughter for a year and a half. 346 F.3d 781, 784-92 (7th Cir. 2003).

B. Sexual Abuse Investigations Often Rely Heavily on Misinterpreted Statements of Children, and Have Given Rise to Poor Investigative Techniques

Child sexual abuse investigations are particularly invasive of the privacy of children and their families, requiring "sensitive" questions. Alford Br. 9. The victim's untainted "disclosures of abuse"—if she is indeed a victim—are often essential, given she may be the sole witness to the offense, Camreta Br. 11. Coercive, leading, suggestive, repetitive and other unprofessional questioning techniques used with an actual child sexual abuse victim can taint the evidence she provides or lead to false positive sexual abuse reports by children who were never abused. *See* STEPHEN CECI & MAGGIE BRUCK, JEOPARDY IN THE COURTROOM (Am. Psych. Ass'n. 1995); Karen Salekin, *The Suggestive Interview and the Taint Hearing: How Much is Too Much?*, 5 J. FORENSIC PSYCHOL. PRAC. 49-64, no. 4 (2005).

Of course, outright browbeating of children to say what the interviewer wants to hear is never recommended and should never occur. *See* J.A. 71 (after S.G. said "no they weren't [bad touches . . .] he kept asking me over and over again, and I would say,

no, I don't think my dad touched me in a bad way. He would say, "No, that's not it,' and then ask me the same question again. For over an hour, Bob Camreta kept asking me the same questions, just in different ways, trying to get me to change my answers. Finally, I just started saying yes to whatever he said."). *See* William Bernet, *Case Study: Allegations of Abuse Created in a Single Interview*, 36 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 966-970, no. 7 (1997), (discussing coercive interviewing by untrained interviewers).

Child sexual abuse investigation is not a proper area for the untrained and the insensitive. Yet, child abuse assessment has been particularly prone to quacks and charlatans who have devised untested methods for finding child abuse by inducing children to give false statements. Therapists in the 1990's began inducing recall of "repressed" memories, including memories of satanic ritual abuse. WEXLER, *supra*, at 339-41. Another fad in the field has been "facilitated communication" to enable handicapped children to disclose assumed abuse through a facilitator guiding their hands on a keyboard, despite the scientific consensus that this technique was as reliable as a Ouija board. *See* FRONTLINE, *Prisoners of Silence*, (Oct. 19, 1993) *transcript available at* http://www.pbs.org/wgbh/pages/frontline/programs/transcripts/1202.html; *see also Morris v. Dearborn*, 181 F. 3d 657, 668 (5th Cir. 1999) (finding an "abusive, irrational, malicious, and oppressive" abuse of governmental power in facilitated communication case involving a 4-year-old child).

Contrary to the urging of the petitioners, Alford Br. 45-46, Camreta Br. 3, 27, child sexual abuse researchers have documented that haste in questioning children about sexual abuse can be counterproductive; most adults who were sexual abused *never* revealed it during their childhood; actual victims may be very reluctant to reveal the abuse upon initial questioning, especially if the questioning is not done with utmost professional skill. *See* London, *supra*, at 195, 198, 201, 203-205. Child abuse victims may be "highly resistant to reporting about [real] abuse in police interviews." Lina Leander, *Police Interviews with Child Sexual Abuse Victims: Patterns of Reporting, Avoidance and Denial*, 34 CHILD ABUSE AND NEGLECT, 192-205, no. 3 (Mar. 2010). Indeed, a controlled study of actual victims has shown a marked difference in disclosure, finding "intrusive and confrontational means certainly do not help reluctant children disclose abuse." IRIT HERSHKOWITZ, ET AL., SUSPECTED VICTIMS OF ABUSE WHO DO NOT MAKE ALLEGATIONS: AN ANALYSIS OF THEIR INTERACTIONS WITH FORENSIC INTERVIEWERS, *in* CHILD SEXUAL ABUSE: DISCLOSURE, DELAY AND DENIAL, 97-113 (Lawrence Erlbaum Assoc. Publ., 2007). *See* KATHLEEN FALLER, INTERVIEW STRUCTURE PROTOCOL AND GUIDELINES, in *id.* Police and CPS investigators often receive inadequate training in sound child interviewing techniques. *Id.* at 81. Recent research has shown that compliance with a model interviewing protocol did not occur without explicit and ongoing training,

even for obvious and general interview principles such as "use open-ended questions and prompts." DEIRDRE BROWN & MICHAEL LAMB, FORENSIC INTERVIEWS WITH CHILDREN: A TWO WAY STREET, *in* KATHRYN KUEHNLE & MARY CONNELL, THE EVALUATION OF CHILD SEXUAL ABUSE ALLEGATIONS: A COMPREHENSIVE GUIDE TO ASSESSMENT AND TESTIMONY 312 (John Wiley and Sons 2009). Moreover, even after such training, every interview must be carefully planned and developmentally appropriate language must be tailored to each interview. *Id.* at 317.

A rush to pull children out of school whenever a Hotline call alleges suspicion of sexual abuse is not a sound or necessary solution to the real concerns of true victims. Indeed, where professional techniques are employed and the documentation of actual abuse is strong, the rates of retraction of child sexual abuse allegations turn out to be very low. *Id.* at 197, 210-211. There is "little evidence to suggest that denials, recantations, and redisclosures are typical when [truly] abused children are directly asked about abuse," London *et al.*, *supra*, at 197, *see id.* at 217 (finding recantation is "uncommon among sexually abused children" whose cases have a high degree of certainty as to their abuse). Whenever there is a high degree of taint from bad interviewing, however, the end result can be what is known as the "Humpty Dumpty effect," POOLE & LAMB, *supra*, at 1045, for it can be impossible to ever determine what happened to a child whose accounts have been contaminated.

Bad interviewing thus hurts both non-victims and true victims of abuse.

III. THE ALLEGATIONS HERE ARE TYPICAL OF UNRELIABLE ALLEGATIONS THAT HARM CHILDREN AND FAMILIES

A. The Hotline Call as To S.G. Was Unreliable and Unsubstantiated, Giving Rise to A Deeply Flawed Investigation

Police are initial child abuse reporters in only 16.3% of cases, 2008 CHILD MALTREATMENT, *supra*, at 7, so in that respect, the investigation involving S.G. was not a typical child abuse investigation. But in most other respects, the investigation in her case was typical of the hundreds of thousands of investigations each year that cause children and families trauma but yield no positive child protection or law enforcement results.

S.G.'s case illustrates the hallmarks of unsubstantiated reports, including:

•The call was based on a second- or third-level hearsay report (*i.e.*, what S.G. had allegedly said to her mother and reports by the Smith's of what Sarah Greene and Nimrod Greene had *told* them). Respondent's Br. 8.

- The original source reporter of the incident is not a neutral party and may have had complex motivations to make the report (here, the family initiating the call was the former employer of the accused father). *Id.*

- The call was based in part on an unobserved touching of another child that may have been misunderstood by that child. *Id.*

- There was little or no specificity in the call (nor was specificity ever developed) as to: (a) when S.G. had been inappropriately touched, including how recently, for how long, or how frequently; or, (b) when the reported disclosure of abuse first occurred. *Id.* at 8-12;

- The nature of the touching is ambiguous (lying down on the bed with S.G.'s father, touching on top of clothes). *Id.* at 8.

These indicia all presented "red flags" showing a need for further investigation *before* the traumatic interview with S.G. occurred.

The school-based interrogation of S.G. also failed to meet the policy goal of minimal repeat interviews that the petitioners espouse. S.G. had to be re-interviewed at the KIDS Center and the ultimate results did not establish abuse; Oregon DHS therefore ultimately sought S.G.'s return to her home. Pet. App. 13. Alford and Camreta did not

keep notes or a video recording of their interview, *id.* at 4, so the basic purpose of securing valid evidence for a prosecution or juvenile court action to protect S.G. (assuming she needed protection) was not served. Unfortunately, unnecessary and intrusive interviews of children like S.G. that produce no useful evidence are a hallmark of many child abuse investigations, explaining in part why the number of reports is so high, while the number of victims of substantiated abuse is a small fraction of the total Hotline calls.

B. The Harm S.G. and Her Family Experienced Due to the Flawed Interrogation Here is Typical of the Disruption of Family Lives of Victims and Accused Family Members

The investigation in S.G.'s case was also typical of the harms children and families experience when bad practices, including poor investigative techniques, are employed without judicial authority, exigency or parental consent. Here, S.G.'s trauma was obvious: she felt sick but was "too scared" to tell the investigators, J.A. 55, and she threw up five times when she got home. J.A. 63. Her statements denying abuse were disbelieved while her statements implicating her father caused her and her sister to be taken from both parents and placed with strangers in a local foster home for 20 days. Pet. App. 12. She was then subjected to a gynecological exam without the support of her mother. *Id.* The record here does not indicate S.G.'s

responses to the idea of going back to school, but it is reasonable to assume that the experience of being pulled from class and questioned by a sheriff and an investigator for two hours did not increase her sense of security in the classroom. It is likely that she and her sister continued to feel shame at the allegations and violated by the invasion of their privacy.

Family members who are subject to false allegations of child abuse report great shame due to the allegations, even when they are cleared of wrongdoing. Sabrina Luza & Enrique Ortiz, *The Dynamic of Shame in Interactions Between Child Protective Services and Families Falsely Accused of Child Abuse*, INST. PSYCHOL. THERAPIES J., 3 ISSUES IN CHILD ABUSE ACCUSATIONS no. 2 (1991) *available at* http://www.ipt-forensics.com/journal/volume3/j3_2_5.htm. Family lives may change without warning and "in an instant." *Id.* Family members are left feeling defenseless and without any idea of the possible consequences that await them. Douglas J. Besharov, *Unfounded Allegations: A New Child Abuse Problem*, 83 PUBLIC INTEREST 18-33 (1986). Harms including career loss, *see Dupuy I*, 141 F. Supp. 2d at 1129-30, divorce, financial loss, and physical symptoms related to extreme stress. Leroy Schultz, *One Hundred Cases of Unfounded Sexual Abuse: A Survey and Recommendation* INST. PSYCHOL. THERAPIES J., 1 ISSUES IN CHILD ABUSE ACCUSATIONS no. 1 (1989) [*available at*] http://www.ipt-forensics.com/journal/volume1/j1_1_4.htm (finding a divorce rate of 20% due to the charges and 22% rate of losing custody). Of course, children are

often taken from parents, sometimes under threats that if they do not "voluntarily" sign away their rights, the children will be taken into foster care. *See Dupuy II*, 462 F. Supp. 2d at 893. False determinations of abuse "harm the children," *Dupuy I*, 141 F. Supp. 2d at 1130, for they deprive children of care they need; the children "lose the benefit of a stable environment" and they cause their wrongly-accused parents and other caregivers to lose "not only their pride and reputation, but often their livelihood as well." *Id.* The sense of shame in families who are wrongly accused "affects the whole self, physical, emotional mental and spiritual." Luza & Ortiz, *supra*. Families report feelings of "isolation, powerlessness, self doubt and depression." *Id.* Many express anger, shock and hurt, by virtue of the allegation and the ensuing investigation. When the investigation continues without a resolution, wrongly-accused parents and caregivers experience "agon[y] and frustrat[ion]." *Dupuy I*, 141 F. Supp. 2d at 1130.

Families do not quickly recover from the disruption of their closest attachments. Rather, the injury of a wrongful allegation is "irreparable." *See, e.g., In re Nicholson*, 181 F. Supp. 2d 182, 185 (E.D.N.Y. 2002) and *Nicholson v. Williams*, 203 F. Supp. 2d 153, *aff'd sub nom. Nicholson v. Scoppetta*, 344 F. 3d 154 (2d Cir. 2003); *Norman v. Johnson*, 739 F. Supp. 1182, 1196 (N.D. Ill. 1990) (granting preliminary injunctive relief based on showing of irreparable harm from family separation).

These harms are the predictable consequences of allowing children to be interrogated at length by strangers about interactions with their parents. The shameful nature of the accusation against the parent only heightens the damage to the child and family when the accusation itself is both misguided and poorly investigated.

IV. THE STATE'S INTERESTS DO NOT OVERWHELM THE BALANCE OF INTERESTS; ADHERANCE TO THE TRADITIONAL FOURTH AMENDMENT REQUIREMENTS FURTHERS THE STATE'S INTERESTS AND PROTECTS CHILDREN

The governmental interest in protecting children from abuse by anyone, including their parents, is "substantial." Camreta Br. 11. But the government has literally no interest at all in expending resources on investigating abuse or neglect that has never occurred, or in separating a child from a fit parent. *See Santosky v. Kramer*, 455 U.S. 745, 767 (1982). To the contrary, the government has an interest in conserving its resources so that children who were not abused or neglected by their parents are left alone, insuring that children's privacy and familial associational rights are protected, and in targeting precious available dollars to the investigation of child abuse

or neglect as to children in genuine need of protection.

In this case, an overly intrusive and ultimately misplaced serious intrusion into S.G.'s personal and family life is exactly what occurred: a child who could not be shown to have been a victim of child sexual abuse had her own and her family's life turned upside down because law enforcement and child protection authorities (Alford and Camreta) decided to use their authority under color of law to interrogate her without a warrant, court order, exigent circumstances, or parental notice or consent. S.G. and her sister K.G. became child victims of misguided attempts to ferret out child abuse where it could not be shown to exist.

As discussed in detail in Sections I and II, the vast majority of child abuse and neglect investigations are unfounded. By the same token, when serious child abuse and neglect occurs, it is often readily ascertainable and immediately meets the "probable cause" standard for judicial intervention. *See, e.g.*, n. 3, *supra*. Indeed, well-handled investigations of child abuse cases that involve the professional questioning of children bring about cases that are prosecutable as well as provable to the satisfaction of a criminal court judge, jury or a juvenile court judge or jury. Where the children receive support from their non-offending parent, instead of having their parent's interests in supporting them summarily ignored, the rates of successful prosecution also increase. Rates of

recantations are much lower in these cases as well. London, *et al.*, *supra*, at 216.

The petitioners stress the difficulties of getting information from the child without the potential taint a parent may cause. Alford Br. 41, Camreta Br. 11. They ignore that these same difficulties are ones that doom prosecutions that commence with the coercion of the intended beneficiary—the child. Children who are unwilling to disclose actual abuse are unwilling to do so for a host of valid reasons that a single interrogation session cannot hope to overcome, and a rush to "get the truth out" of an alleged victim who is a genuine victim is fraught with the danger that such interrogation will sour an otherwise effective plan. Working with the child's family is essential, 42 U.S.C. § 5106(a)(1)(E) (requiring states to "promote collaboration with the families from the initial time of contact during the investigation through treatment"), because children who see their families destroyed by virtue of their allegations may recant even truthful allegations. Dara Steele, *Expert Testimony: Seeking an Appropriate Admissibility Standard for Behavioral Science in Child Sexual Abuse Prosecutions*, 48 DUKE L. J. 933, 939 (1999). Indeed, as the amici Attorneys General note, parental support for victims is often both essential to a successful prosecution and a causal factor in failed prosecutions. Attorneys General Br. 17-18. For all these reasons, a rush to interrogate a child victim without parental consent is a bad idea all around.

The traditional Fourth Amendment requirements that the Ninth Circuit held should apply to police/CPS custodial interrogations of children in public schools strike exactly the right balance to protect the child from unwarranted intrusion, insure that sufficient evidence is secured first before rushing in, and provide for the proper level of parental involvement in legitimate investigations of child abuse. The petitioners have not shown a need to relax the Fourth Amendment standard here in light of the state's interests in law enforcement and child protection arising from child sexual abuse allegations. To the contrary, because child sexual abuse presents especially complicated circumstances bearing on children's privacy and family life and because the risk of error in these investigations is great, heightened constitutional protections help not only the child and the family but also serve the State's interests in protecting true victims of abuse and prosecuting true offenders.

CONCLUSION

For the reasons argued above, if this Court reaches the merits of this case, it should affirm the Ninth Circuit Court of Appeals' holding that the seizure of S.G. violated the Fourth Amendment.

Respectfully submitted,

Diane L. Redleaf
Counsel of Record
Family Defense Center
725 South Wells, Suite 702
Chicago, Illinois 60607
(312) 356-3202 ext. 11
diane@familydefensecenter.net

January 31, 2011 *Counsel for amicus curiae*

Nos. 09-1454 and 09-1478

In The
Supreme Court of the United States

Bob Camreta,

Petitioner,

v.

Sarah Greene, Personally and as Next Friend for S.G., S.G., a minor, and K.G., a minor,

Respondent.

James Alford,

Petitioner,

v.

Sarah Greene, personally and as Next Friend for S.G., a minor, and K.G., a minor,

Respondents.

On Writ of Certiorari To The
United States Court of Appeals for the Ninth Circuit

BRIEF OF THE FAMILY RESEARCH COUNCIL AND THE AMERICAN COALITION FOR FATHERS AND CHILDREN AS AMICI CURIAE IN SUPPORT OF THE RESPONDENTS

Gary S. McCaleb
Brian W. Raum
Alliance Defense Fund
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

Debbie Maken
Attorney at Law
7924 Cranes Pointe Way
West Palm Beach, FL 33412
(561) 685-4505

David Austin R. Nimocks
Counsel of Record
Alliance Defense Fund
801 G Street, N.W., Suite 509
Washington, D.C. 20001
(202) 393-8690
animocks@telladf.org

Counsel for Amicus Curiae Family Research Council and American Coalition for Fathers and Children

TABLE OF CONTENTS

INTEREST OF *AMICI* 1

LEGAL ARGUMENT 1

I. PARENTS HAVE A FUNDAMENTAL LIBERTY INTEREST IN THE CUSTODY, CARE, CONTROL AND MANAGEMENT OF THEIR CHILDREN UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION. 2

II. PARENTS DO NOT FORFEIT THEIR FUNDAMENTAL LIBERTY INTERESTS BY ENROLLING THEIR CHILDREN IN PUBLIC SCHOOL. 10

III. THE NONCONSENSUAL INTERROGATION OF THE CHILD VIOLATED THE PARENTS' CONSTITUTIONAL RIGHT TO PRIVACY, RIGHT TO DIRECT THE EDUCATION OF THE CHILD, AND RIGHT TO DETERMINE FAMILIAL ASSOCIATION. 14

IV. PARENTS' FUNDAMENTAL INTEREST IN THEIR CHILD SUPERSEDES THE LIMITED INTEREST OF THE STATE. 17

V. THE PROCESS DUE PARENTS AT THE INVESTIGATIVE STAGE 23

1. *Private Interests of Families* 23

2. *The State's Interest* 24

3. *The Unlimited License Sought by the State to Interview Children without Parental Consent or Management Risks Harming the Child* 25

4. *Depriving Parents of their Fundamental Liberty Interest in Consenting to, Participating in, or Terminating Child Interviews Invites Risk of Producing Inaccuracies in Fact-Finding* 27

5. *The Risk of Error in Unchecked Investigatory Practices is Deterred by Safeguarding the Parental Liberty Interests in the Investigative Phase* 28

6. *The Government's Limited Interest in Children is not being Hampered, but Advanced, by Securing Parental Consent or a Warrant* 31

CONCLUSION 37

TABLE OF AUTHORITIES

Federal Cases:

Addington v. Texas,
441 U.S. 418 (1979).....31

Calabretta v. Floyd,
189 F.3d 808 (9th Cir. 1999)
.....15, 24, 25, 29, 30, 32, 36

Darryl H. v. Coler,
801 F.2d 893 (7th Cir. 1986).....13, 16, 28

Doe v. Heck,
327 F. 3d 492 (7th Cir. 2003)
.....12, 13, 15, 16, 22, 26, 29, 33, 36, 37

Dubbs v. Head Start, Inc.,
336 F. 3d 1194 (10th Cir. 2003)
.....12, 13, 14, 30, 36

Edwards v. Rees,
883 F. 2d 882 (10th Cir. 1989).....11

Ferguson v. City of Charleston,
532 U.S. 67 (2001).....13

Franz v. Lytle,
997 F. 2d 784 (10th Cir. 1993).....13, 21, 26, 29

Good v. Dauphin County Social Services,
891 F. 2d 1087 (3rd Cir. 1989).....21

Griswold v. Connecticut,
381 U.S. 479 (1965) 14, 15, 16

Illinois v. Lidster,
540 U.S. 419 (2004) 32

In re Gault,
387 U.S. 1 (1967) 20

Jones v. Hunt,
410 F. 3d 1221 (10th Cir. 2005) 13, 14

Lassiter v. Dept. of Social Servs. of Durham Cty.,
452 U.S. 18 (1981) 28

Mathews v. Eldridge,
424 U.S. 319 (1976) 23

May v. Anderson,
345 U.S. 528 (1953) 23

Meyer v. Nebraska,
262 U.S. 390 (1923) 3, 4, 10, 19, 26, 31

Miranda v. Arizona,
384 U.S. 436 (1966) 28

M.L.B. v. S.L.J.,
519 U.S. 102 (1996) 2, 8, 15, 23, 31, 32

Moore v. City of East Cleveland,
431 U.S. 494 (1977) 2, 6

New Jersey v. T.L.O.,
469 U.S. 325 (1985) 10, 11, 12, 14

Olmstead v. U.S.,
277 U.S. 438 (1928).....35

Parham v. J.R.,
442 U.S. 584 (1979).....2, 6, 7, 17, 18, 19, 23, 32

Pierce v. Society of Sisters,
268 U.S. 510 (1925).....3, 4, 11, 19, 26

Prince v. Massachusetts,
321 U.S. 158 (1944).....2, 3, 4, 5

Roe v. Texas Dept. of Protective and Reg. Servs.,
299 F. 3d 395 (5th Cir. 2002).....13, 31

Santosky v. Kramer,
455 U.S. 745 (1982)
.....2, 7, 8, 17, 18, 20, 23, 24, 25, 26, 27, 31, 32

Skinner v. Oklahoma,
316 U.S. 535 (1942).....23

Smith v. Organization of Foster Families,
431 U.S. 816 (1977).....7

Stanley v. Illinois,
405 U.S. 645 (1972)
.....5, 6, 19, 20, 23, 26, 30, 31, 32, 33, 34

Tenenbaum v. Williams,
193 F. 3d 581 (2nd Cir. 1999)
..... 12, 23, 29, 33, 34, 36

Tinker v. Des Moines Indep. Comm. Sch. Dist.,
393 U.S. 503 (1969).....11, 12, 35

Troxel v. Granville,
530 U.S. 57 (2000)
.....2, 9, 10, 13, 16, 21, 22, 23, 26, 27

Van Emrik v. Chemung County
Dept. of Social Services,
911 F. 2d 863 (2nd Cir. 1990).....29

Vernonia Sch. Dist. 47J v. Acton,
515 U.S. 646 (1995).....10, 11

Wallis v. Spencer,
202 F. 3d 1126 (9th Cir. 1999)
.....20, 21, 23, 25, 26, 28, 29, 30, 32, 33

Wisconsin v. Yoder,
406 U.S. 205 (1972).....5, 10, 19, 26

State Cases:

Kazery v. State,
995 So. 2d 827 (Miss. 2008).....37

Weis v. State,
800 N.E.2d 209 (Ind. App. 2003).....37

Statutes:

Or. Rev. Stat. § 419B.020 16

Other Authorities:

Barbara Shulman, *The Supreme Court's Mandate for Proof Beyond a Preponderance of the Evidence in Terminating Parental Rights*, 73 J. Crim. & Criminology 1595 (Winter 1982) 18, 19

Candra Bullock, Comment: *Low-Income Parents Victimized by Child Protective Services*, 11 Am. U.J. Gender Soc. Pol'y & L. 1023 (2003) 21

Doriane Lambert Coleman, *Storming the Castle: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 William & Mary L. Rev. 413 (2005) 14, 25, 29, 33

Martin Guggenheim, What's Wrong with Children's Rights (Harvard University Press 2005) 18, 19

Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 42 Fam. Ct. Rev. 540 (2004) 24

Vivek S. Sankaran, *Parens Patriae Run Amuck: The Child Welfare System's Disregard for the Rights of Non-Offending Parents*, 82 Temple Law Review 55 (Spring 2009) 19, 33

INTEREST OF *AMICI*

Amici are non-profit organizations, with memberships in various states, that share a common concern over laws and policies that impact the family. The Family Research Council (FRC) is a 501(c)3 non-profit organization located in Washington, D.C., that exists to develop and analyze governmental policies affecting the family. FRC is committed to strengthening traditional families in America and advocates policies promoting that goal. Therefore, FRC supports an understanding of the Fourth Amendment that protects parents' rights regarding their children's interaction with government agencies. The American Coalition for Fathers and Children (ACFC) based in Washington, D.C. is also a non-profit organization that recognizes the parent and child relationship is essential to our society and constitutionally protected against unreasonable government interference. Their collective work has included policy reports, education, testimony before governmental bodies, and litigation.[1]

LEGAL ARGUMENT

The propriety of child abuse investigations is inextricably intertwined with one of this nation's oldest, most sacred fundamental liberties—the right

---

[1] . *Amici*, pursuant to the open consent letters filed by the respective counsel for Petitioners and Respondent, submit this brief in support of the Respondent, Greene family. In accordance with Supreme Court Rule 37.6 *Amici* state that no attorney from any of the parties participated with, or paid for, this *amicus* brief.

of parents in the care, custody, control, and management of their child, and the right to maintain family integrity. The Ninth Circuit's holding was in part based on the Fourteenth Amendment fundamental liberty interest of parents. *Greene v. Camreta*, 588 F.3d 1011, 1037 (9th Cir. 2009). Even this Court's consideration of the matter under the Fourth Amendment, will undoubtedly implicate the parents' procedural and substantive due process rights under the Fourteenth Amendment. *M.L.B. v. S.L.J.*, 519 U.S. 102, 121 ("due process and equal protection principles converge"). "What process is constitutionally due cannot be divorced from the nature of the ultimate decision that is being made." *Parham v. J.R.*, 442 U.S. 584, 608 (1979).

I. PARENTS HAVE A FUNDAMENTAL LIBERTY INTEREST IN THE CUSTODY, CARE, CONTROL AND MANAGEMENT OF THEIR CHILDREN UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

"[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503-04 (1977) (plurality opinion). This Court has long recognized the fundamental right of natural parents to direct the upbringing of their children, especially when the state purports to know better. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion); *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996); *Santosky v. Kramer*, 455 U.S. 745, 753-54 (1982); *Parham v. J.R.*, 442 U.S. 584, 608 (1979); *Prince v.*

Massachusetts, 321 U.S. 158, 166 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). Uniformly, these cases uphold the time honored principle that *parents* have a fundamental liberty interest in maintaining the care, custody, companionship and management of their children.

In *Meyer*, a German schoolteacher challenged his conviction for illegally teaching a foreign language to students. *Meyer*, 262 U.S. at 397. Meyer argued that the law unreasonably infringed on his liberty interest protected by the Fourteenth Amendment. *Id.* at 399. This Court embraced Meyer's argument, explaining:

> While this Court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes ... the right of the individual ... to marry, establish a home and bring up children ....
>
> [The teacher's] right to teach and the right of parents to engage him so to instruct their children, we think are within the liberty of the Amendment.

Id. at 399-400. *Meyer* began the long cascade of cases specifically rejecting a broad *parens patriae* notion that children were held in "common" between the State and the parent. *Id.* at 401.

Two years later, in *Pierce v. Society of Sisters*, *supra*, this Court again upheld the wide scope of the liberty interest provided to parents by the Fourteenth Amendment when it overturned an Oregon statute that prohibited parents from enrolling their children in private school. *Pierce*, 268 U.S. at 530. Relying on *Meyer*, this Court held that the statute:

> unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. ... The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Id. at 534-35.

This Court again revisited the issue of parental rights in *Prince v. Massachusetts*, *supra*, when a woman took her niece (over whom she had custody), to sell religious literature on the streets of Boston. The woman was convicted for violating a child labor law. *Prince*, 321 U.S. at 160-61. Here, this Court concluded that the state's interest in prohibiting

child labor outweighed custodial rights, but cautioned that its "ruling d[id] not extend beyond the facts the case present[ed]." *Id.* at 171 ("religious training and indoctrination of children may be accomplished in many ways ... [t]hese and all others except the public proclaiming of religion on the streets ... remain unaffected by the decision").

This Court reaffirmed its commitment to the rights of natural parents in *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972), overturning convictions of Amish parents for removing their children from school before age sixteen. The state's interest in providing universal education had to "yield to ... the interest of parents in directing the rearing of their off-spring." *Yoder*, 406 U.S. at 213-14. The *Yoder* Court noted that the state can override parents only where "it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens." *Id.* at 233-34. "The primary role of parents in the upbringing of their children is now established beyond debate as an enduring American tradition." *Id.* at 232.

Around the same time, this Court also took up the issue of parental rights as applied to an unwed father in *Stanley v. Illinois*, 405 U.S. 645 (1972). Following the death of the mother, Stanley, the natural father, directed that his children move into his friend's home, much to the chagrin of the state, which sought to make another choice for the children. *Stanley*, 405 U.S. at 658.

> The private interest here, that of a man in the children he has sired and raised,

> undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when appeal is made to the liberties which derive merely from shifting economic arrangements."

Id. at 651. This Court concluded "that all [ ] parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody" and laid the groundwork for the presumption of parental fitness. *Id.* at 658.

In *Moore v. City of East Cleveland*, *supra*, this Court struck down a housing ordinance that restricted categories of relatives who could live together as "intrud[ing] on choices concerning family living arrangements." *Moore*, 431 U.S. at 499 (plurality opinion). The *Moore* court employed the principles elucidated in "*Yoder, Meyer* and *Pierce*" in a school setting, and extended them to "households" where "decisions concerning child rearing" were "shared with ... other relatives" who take on major responsibilities for the child. *Id.* at 503-05.

In *Parham v. J.R.*, *supra*, this Court considered the ability of the state to second guess the decisions of natural parents to commit their own child to a mental institution without state approval. This Court recognized that parents made such difficult

choices based on their own observations and independent professional recommendations, and that "[n]either state officials nor federal courts are equipped to review such parental decisions." *Parham*, 442 U.S. at 604.

> [H]istorically [the law] has recognized that natural bonds of affection lead parents to act in the best interest of their children. ... The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to the American tradition.

Id. at 602-03 (emphasis in original); *see also Smith v. Organization of Foster Families*, 431 U.S. 816, 847, 860 (1977) (differentiating foster families as "squatters" to the rights enjoyed by natural parents, who would have a "liberty interest" in the "survival" or an "expectancy" of "continuation" of their family that is protected under the Fourteenth Amendment).

Finally in 1982, in *Santosky v. Kramer*, 455 U.S. 745 (1982), this Court squarely addressed parental rights in the context of a state proceeding seeking to extinguish both a family's natural and legal relationship. The *Santosky* Court held that before a state could completely and irrevocably sever the rights of a parent in their natural child, due process required that the state support its allegations by at least clear and convincing evidence. New York's statutory scheme providing for a "fair preponderance of the evidence" standard was "inconsistent with due

process" owed to parents and children. *Santosky*, 455 U.S. at 758. The Court held that the private interest affected in maintaining family association was a "commanding" one, and that the "risk of error" from employing the lower standard of proof was "substantial" since it distributed a near equal allocation of risk of error as shared between the parents and the State. *Id.* at 761 ("we have no difficulty finding that the balance of private interests strongly favors heightened procedural protections").

Though the children had been in the state's care for three years, and the parents were not ideal, this Court held that the "fundamental liberty interest of natural parents in the care, custody and management of their child" did not "evaporate." *Id.* at 753. The Court again reiterated that a natural parent's "interest [is] far more precious than any property right." *Id.* at 758-59.

After *Santosky*, this Court decided that a state may not condition a right to appeal a termination of parental rights decree on that parent's ability to pay a record preparation fee in *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). Though much of the *M.L.B.* opinion was based on the equal access to courts rationale, this Court nonetheless reaffirmed that the family relationship is a protected associational right that is "sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B.*, 519 U.S. at 116.

Even within the last decade, this Court has remained steadfast to the rights of natural parents.

In *Troxel v. Granville*, 530 U.S. 57 (2000), six justices coalesced around the parents' liberty interest to determine a child's associations, finding "breathtakingly broad" a state law that, based on a "best interest" standard, opened the door to any third parties seeking legal relationships with children over the objections of the natural parents. *Troxel*, 530 U.S. at 65-68 (plurality opinion), 78 (Souter, J., concurring), 80 (Thomas, J., concurring).

> The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.

Id. at 65 (plurality opinion), accord at 77 (Souter, J., concurring); 80 (Thomas, J., concurring).

The distillation of these cases means that natural parents have the protected right to direct, control, care for, and manage their children, including the right to determine their associations, for what purpose, for how long, and of what they are informed. This fundamental liberty is not diminished simply because an abuse allegation was cast, or when children are located away from their home or parents.

II. PARENTS DO NOT FORFEIT THEIR FUNDAMENTAL LIBERTY INTERESTS BY ENROLLING THEIR CHILDREN IN PUBLIC SCHOOL.

The parents' right to control the education of their children is fundamental. When schools are employed to this end, they are entrusted agents of the parents' desire to carry out the educational process. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995) (public school children are only "committed to the temporary custody of the State as schoolmaster"); *Meyer*, 262 U.S. at 400 ("it is the natural duty of the parent to give his children education suitable to their station in life"); *Yoder*, 406 U.S. at 213 (the state's interest in education, *i.e.*, creating good citizens ... "yield[s] to ... the interest of parents in directing the rearing of their off-spring"); *Prince*, 321 U.S. at 166 (parents have the "primary function" to prepare children); *Troxel*, 530 U.S. at 65-66 ("It is cardinal with us that the custody, care and nurture of the child reside *first* in the parents") (emphasis added). Thus, the State is merely acting *in loco parentis* to fulfill the educational mission, *New Jersey v. T.L.O*, 469 U.S. 325, 336 (1985), and in entrusting children to schools, *parents are merely extending their authority to educate the child, not giving up their rights or authority over the child.*

> [A parent] may ... delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of he parent committed to his charge, viz. *that of restraint and correction*, as may be

> necessary to answer the purposes for which he is employed.

Vernonia Sch. Dist., 515 U.S. at 655, quoting 1 William Blackstone, Blackstone's Commentaries on the Laws of England 441 (1769) (emphasis added).

For that reason, schools receive some latitude and escape exacting constitutional scrutiny when it comes to "maintaining order and discipline" in the school because that goal is consonant with the overall educational mission. *T.L.O.*, 469 U.S. at 340; *Edwards v. Rees*, 883 F.2d 882, 884 (10th Cir. 1989). But children do not belong to the State "during classroom hours" and to parents afterwards. *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 506, 512 (1969). Children are always extensions of their family. *Pierce*, 268 U.S. at 534-35.

Petitioners argue that the child's privacy interests must only be balanced against the State's interest in child abuse. (Camreta Brief 15; Alford Brief 32-33). However, that proposition makes S.G. (the child in question) a "mere creature of the State," by implying that her parents choice for her to attend public school makes anything fair game. But this Court has held that its "decision[s] cannot be taken as establishing that the State may impose and enforce any conditions that it chooses upon attendance at public institutions of learning, however violative they may be of fundamental constitutional guarantees." *Tinker*, 393 U.S. at 507 n.2.

Petitioner Alford discounts any affront to the fundamental liberty interests of S.G.'s parents because he sought "permission" from the school "to interview S.G." (Alford Brief 8). But schools cannot give meaningful consent to an interview. *Tinker*, 393 U.S. at 511 ("[s]chool officials do not possess absolute authority over their students"); *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003) (school officials cannot consent for the parents to produce a child). Nor can passivity or silence form a basis for consent. *Dubbs v. Head Start, Inc.*, 336 F.3d 1194 (10th Cir. 2003) (head start program needed actual parental consent to do physical examination of children).

Additionally, there is a logical disconnect to treating the school, a state actor, simultaneously, as a parental surrogate for purposes of consent:

> If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental authority when conducting searches of their students.

T.L.O., 469 U.S. at 336. One agency of the government cannot give consent for the parents to another state instrumentality. *Greene*, 588 F.3d at 1030 n.18. "The handing over of a child from a public school teacher to another State official, then, is not the equivalent of the consent of the parents." *Tenenbaum v. Williams*, 193 F.3d 581, 594 n.9 (2nd Cir. 1999).

Children also cannot give meaningful consent because of the legal handicap of minority. "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." *Troxel,* 530 U.S. at 68. Moreover, children would naturally feel overpowered and are too vulnerable to terminate encounters with agents of the State. *See Jones v. Hunt*, 410 F.3d 1221 (10th Cir. 2005) (*T.L.O.* and *Rees* cases are distinguished as "maintaining school discipline" cases, and irrelevant to determining if a seizure has occurred); *Doe,* 327 F.3d at 510. Parents are the natural guardians of their children and speak exclusively for their children. *Dubbs*, 336 F.3d at 1207.

Therefore, only a parent can give meaningful consent to an interview, and that consent must be knowing and voluntary. *Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986) (mother comforting child during a physical strip search at school is not voluntary consent); *Franz v. Lytle*, 997 F.2d 784 (10th Cir. 1993) (misleading parent on nature of the investigation means no consent); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (no consent of drug-addicted mothers for hospital tests that were disclosed to government); *Roe v. Texas Dept. of Protective and Reg. Servs.*, 299 F.3d 395 (5th Cir. 2002) (initial allowance to investigator for home interview did not extend "consent" to photographing child's body).

The public school's reflexive accommodation of other agents of the state is no substitute for the consent of a parent.

III. THE NONCONSENSUAL INTERROGATION OF THE CHILD VIOLATED THE PARENTS' CONSTITUTIONAL RIGHT TO PRIVACY, RIGHT TO DIRECT THE EDUCATION OF THE CHILD, AND RIGHT TO DETERMINE FAMILIAL ASSOCIATION.

"Privacy interests suffer[ ]" when government officials intrude into the life of the family. *Jones v. Hunt*, 410 F.3d 1221, 1225 (10th Cir. 2005); *T.L.O.*, 469 U.S. at 335. The right of familial privacy belongs to every member of the family regardless of location.[2] No parent or child is any less a member of their family when attending school or work, driving around town, or conducting any other activity outside the home. The liberty interest of parents in maintaining the custody, control, care and management of their children becomes "less secure" if their privacy interests are eroded simply because members of their family are temporarily in different locations. *See Griswold v. Connecticut*, 381 U.S. 479,

---

[2] "The focus of the [Fourth] Amendment is [ ] on the security of the person, not the identity of the searcher or the purpose of the search." *Dubbs*, 336 F.3d at 1206. "[T]he Amendment focuses on safeguarding persons from unwarranted intrusion ...." *Jones*, 410 F.3d at 1225 (citing *Dubbs*, 336 F.3d at 1205 ("There is no 'social worker' exception to the *Fourth Amendment*")); *see also* Doriane Lambert Coleman, *Storming the Castle: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 William & Mary L. Rev. 413 (2005).

482-83 (1965) ("[w]ithout those peripheral rights the specific rights would be less secure").

"An essential aspect of privacy ... is the parent's and the child's interest in the privacy of their relationship with each other." *Calabretta v. Floyd,* 189 F.3d 808, 820 (9th Cir. 1999). The questioning of a child (on any nonconsensual topic) by a third party, in and of itself, violates the privacy rights of both the child and his parents, whether the state directed inquiry centers around pet cats, or veers off into a discussion about parental reading choices, drinking and smoking habits, family history, or discipline methods.. *Doe,* 327 F.3d at 504, 510 (going "to the school for the specific purpose of gathering information" is a "search"). The home lives of children do not become a proverbial "open book" when they attend a public school. "[E]ven where the child is too young to have the same subjective sense of bodily privacy," certain actions unquestionably affect the "legitimate expectations of the parents ..., protected by the fourteenth amendment, that their familial relationship will not be subject to unwarranted state intrusion." *Calabretta,* 189 F.3d at 818. Unreasonably intrusive state action cannot be justified on the basis of sexual abuse occurring "in secret" because family life in general occurs in private, and the right of each family member to maintain this privacy is constitutionally protected.

An interrogation of the child as to her home life, if done without parental consent, constitutes a deprivation of the parents' fundamental liberty interest in family association as well. *M.L.B.*, 519 U.S. at 116. Thus, it is a constitutional betrayal to

parents who, through their own constitutional authority, placed a school *in loco parentis,* when that school, without notice or consent, removes their children from class and places them into a secluded room with strangers so that the State can explore allegations. Parents and children maintain their inextricable and non-circumstantial "expectations of privacy" in a public school setting, even if a child is too young to appreciate such a right. *Doe*, 327 F.3d at 512; *Darryl H.*, 801 F.2d at 901.

Indeed, schools routinely require written parental permission for a field trip, and yet, flout parental prerogatives in handing over someone else's child to perfect strangers to have *carte blanche* in asking anything the state asserts as important.[3] This irony is especially great where the nonconsensual conversation implicates the child's present and future relationship with his family, and vice-versa.

Parents have an interest in who their child is talking to, whether malicious strangers, positive role models, corruptible childhood companions, or child protective investigators with their own agenda. *Troxel*, 530 U.S. at 78 ("a parent's interest in

---

[3] Oregon did not require law enforcement or child protective investigators to notify or seek the consent of parents in interrogating their child when the underlying incident occurred, nor have any statutory revisions since then improved this constitutional deficiency. *Compare* Or. Rev. Stat. § 419B.020 (2001) and Or. Rev. Stat. § 419B.020 (2009). Petitioner Alford admits that it was their policy, i.e. "regular practice," pursuant to "DHS rules and training" to not necessarily advise parents in conducting school based interviews. (Alford Brief 8).

controlling a child's associates is [ ] obvious[, ... it is a] choice ... not essentially different from the designation of adults who will influence the child in school"). Thus, the constitutional offenses resulting from the kinds of nonconsensual interrogations involved in the case *sub judice* are many, going well beyond the privacy interests of the parents and their children. Parents are being deprived of their rights in the management of their child, their right to participate in the conversation, to comfort and support the child regarding any emotional trauma resulting from the interrogation, and to terminate the conversation if the parent believes that to be in the best interests of their child.

IV. PARENTS' FUNDAMENTAL INTEREST IN THEIR CHILD SUPERSEDES THE LIMITED INTEREST OF THE STATE.

"The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition." *Parham*, 442 U.S. at 603 (emphasis in original). Parents and children do not have competing interests, and it is not correct to *presume* or *assume* that parents and children are "adversaries." *Santosky*, 455 U.S. at 760 ("until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship"). Our Constitution treats parents as natural allies of their children. *Parham*, 442 U.S. at 602. The Petitioners are guided by the view that parents are "frequent perpetrators of abuse." (Alford Brief 41).

Our jurisprudence holds a high regard for the family into which a child has been born. *Santosky*, 455 U.S. at 759, 765-66 (rejecting "balanc[ing]" of the "the child's interest in a normal family home against the parents' interest in raising the child," or consideration of "whether the child would have a better home elsewhere"). Our Constitution assumes that children want to remain with their natural family. *Id.* at 766. This Court has never recognized a separate interest or right that is child-specific, *per se*; the only recognized right for children in this context is the child's reciprocal right to maintain his natural family relationship. *Parham*, 442 U.S. at 603 (not all choices will be "agreeable to a child," but that "does not automatically transfer the power to make that decision from parents to some agency or officer of the state"); *Santosky*, 455 U.S. at 765. Shibboleths urging the government's "special interest" in protecting children, or invoking the altruistic language of "best interest," or simply saying that "children have a right to be free from harm" are legally insufficient criteria for "children's rights" and elevating the role of the state into the lives of families. *See* Martin Guggenheim, What's Wrong with Children's Rights, *passim* (Harvard University Press 2005). *All* human beings have dignity and the right to be free from harm—it is not uniquely a children's right. The *Santosky* Court's "refusal to consider the rights of the children [was] analytically correct, since such consideration would involve the assumption of unproven facts. ... [T]he refusal demonstrates th[is] Court's commitment, as a policy matter, to the autonomy of the family unit." Barbara Shulman, *The Supreme Court's Mandate for*

Proof Beyond a Preponderance of the Evidence in Terminating Parental Rights, 73 J. Crim. & Criminology 1595, 1606 (Winter 1982).

Our jurisprudence does not see the child in isolation, but as an extension and ward of his parents, not the state. *Parham*, 442 U.S. at 602-03 (parents are *presumed* to "act in their child's best interest"); *Pierce*, 268 U.S. at 535; *Meyer*, 262 U.S. at 401. Children are not merely autonomous individuals needing the cacophony of alternate voices (*e.g.*, state social services, guardian ad litems, educators, etc.) contending to speak on their behalf. *Yoder*, 406 U.S. at 213; *Parham*, 442 U.S. at 606 (rejecting childhood by committee approach); Guggenheim, What's Wrong with Children's Rights 95 (*e.g.*, assigning independent counsel for a toddler to advance the child's so-called interest is a legal fiction, as that grown-up lawyer assigned is merely advancing what that grown-up envisions as best for the child). Our Constitution rejects the notion that children receive independent consideration "absent a finding of neglect or abuse" by their parents. *Parham*, 442 U.S. at 604.

The State and the parent do not stand in equipoise, or have an equal interest in the child. Vivek S. Sankaran, *Parens Patriae Run Amuck: The Child Welfare System's Disregard for the Rights of Non-Offending Parents*, 82 Temple Law Review 55 (Spring 2009) (showing a historical rejection of broad *parens patriae* doctrine as case law on parental liberty interest was developed in *Meyer, Pierce, Prince, Yoder*). "The State's interest in caring for ... children is de minimis if [the parent] is shown to be [

] fit." *Stanley*, 405 U.S. at 657-58 (the State "spites its own articulated goals" of child protection when it presumptively and arbitrarily removes children without a due process hearing). The State's *parens patriae* interest in promoting the welfare of the child is secondary and triggered only where parents have been determined unfit. *Santosky*, 455 U.S. at 767 n.17; *cf. In re Gault*, 387 U.S. 1, 16, 30 (1967) (pejoratively describing latin term *parens patriae* as a rationalization "to exclude juveniles from the constitutional schemes" and invite "procedural arbitrariness").

The State has no viable interest in children who are with fit parents. The State only has an interest in children who are genuinely abused and need protection, and even then, that interest arises only after a judicial adjudication of parental unfitness. The State's obligation to investigate criminal conduct is a general welfare concern that extends to all its citizenry. That the State may not know whether the child in question is or is not abused, or encounters difficulty in determining same, is not a basis for the violation of fundamental rights of all parents to discover same.

> The fact that the suspected crime may be heinous—whether it involves children or adults—does not provide cause for the state to ignore the rights of the accused or any other parties. Otherwise, serious injustices may result. In cases of alleged child abuse, governmental failure to abide by constitutional constraints may have

> deleterious long-term consequences for the child and ... for the entire family.

Wallis v. Spencer, 202 F.3d 1126, 1130 (9th Cir. 1999). "Fourth Amendment ... governing principles should [not] vary depending on the court's assessment of the gravity of the societal risk involved." *Good v. Dauphin County Social Services*, 891 F.2d 1087, 1094 (3rd Cir. 1989) (citing *Mincey v. Arizona*, 437 U.S. 385, 393 (1969)); *Franz*, 997 F.2d at 785 ("because of our deep concern for the safety and well-being of young children that we ... do not balkanize the Fourth Amendment").

Here, assuming Petitioners were pursuing the proper mission[4] of investigating suspected child maltreatment, its interest in the Greene children is still *de minimis* because the children were with presumptively fit parents. *Stanley, Santosky, infra.* Here, the Greene parents *are presumed fit because that is how the Constitution treats natural parents and they retain that presumption* because there never was a *judicial finding* of abuse or neglect as to either one. *Troxel*, 530 U.S. at 68 ("no court has found, that Granville was an unfit parent, [and t]hat aspect of the case is important, for there is a presumption [of parental fitness]"). *An anonymous call is constitutionally insufficient to rebut the*

---

[4] Under misguided federal legislation, states have a monetary incentive to create wards. Candra Bullock, Comment: *Low-Income Parents Victimized by Child Protective Services*, 11 Am. U.J. Gender Soc. Pol'y & L. 1023, 1048 (2003) (the Child Abuse Prevention and Treatment Act ("CAPTA") "has been criticized as being the source of 'huge fundraisers' for child protective service agencies.").

presumption of parental fitness; it is quite a leap to conclude that neither of the Greene parents can any longer function in their child's best interest. "Any apprehension" entertained by the state neither topples the presumption, nor is it a constitutionally acceptable standard for the deprivation of liberties, because *concerns are something anyone can have.* (Alford Brief 44: "any apprehension"; Camreta Brief 11, 27: based on "speculation and hearsay"). A concern-driven interview of a child, bereft of parental consent, deprives parents of their well-established fundamental liberty interests, turning the constitutional presumption due parents on its head. *Troxel,* 530 U.S. at 68 (the state's decision to force an association onto the mother "applied exactly the opposite presumption" from "fit parents act in the best interests of their children").

Consequently, *all* parents under *any* suspicion are presumed abusers—unfit to care for their children, unworthy to even have a voice in their child's interrogation. *See Doe,* 327 F.3d at 521 (the State "not only failed to presume that the plaintiff parents would act in the best interest of their children, they assumed the exact opposite, that the parents might be complicit in any abuse ... meted out by [the] Principal"). Simultaneously, the State crowns itself the champion of children and their self-appointed warden. However, this lofty view of the State as a super-parent has been soundly rejected by this Court in *Meyer, Pierce, Yoder, Stanley, Santosky,* and *Troxel, infra.* Thus, Petitioners' suggested constitutional framework, designed to obviate parental consent, undermines almost a century of this Court's jurisprudence.

V. THE PROCESS DUE PARENTS AT THE INVESTIGATIVE STAGE.

The *Santosky* Court balanced three distinct factors found in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) to grapple with the question of what process was due parents: (1) the private interest that will be affected by the state's action; (2) the risk of an erroneous deprivation of the fundamental interest through the procedures used, and the benefit of other additional procedural safeguards; and (3) the government's interest, including any administrative or fiscal burdens associated with substituted or additional requirements. *Santosky*, 455 U.S. at 754-55.

1. *Private Interests of Families*

A parent's interest in maintaining his family is an "essential," "basic civil right of man," "far exceeding mere property rights," and "beyond debate as an enduring American tradition." *Stanley*, 405 U.S. at 649-52; *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), *May v. Anderson*, 345 U.S. 528, 533 (1953); *see also Parham*, 442 U.S. at 602 (1979); *M.L.B.*, 519 U.S. at 118; *Troxel*, 530 U.S. at 66. Both the child and the parent share the same interest in living free from unwarranted governmental interference. *Stanley*, 405 U.S. at 649-52, *Santosky*, 455 U.S. at 753, 765-66; *Tenenbaum*, 193 F.3d at 600; *Wallis*, 202 F.3d at 1136.

Since parents' "fundamental liberty interest" in their child "does not evaporate simply because they have not been model parents," there is no reason to

allow the rights of parents to be cast aside during an investigation, where parents merely sit under suspicion. *Santosky*, 455 U.S. at 753. "[P]arents [always] retain a vital interest in preventing the . . . destruction of their family life." *Id.* "[A]t the factfinding [stage], the interests of the child and his natural parents coincide to favor use of error-reducing procedures." *Santosky*, 455 U.S. at 761.

Accordingly, parents are due process during investigations, just like they receive due process during a termination proceeding. Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 42 Fam. Ct. Rev. 540, 543-45 (2004) (discussing the high rate of "false positives," "more than one in three" were "later found not to have been maltreated at all" in light of easily wrought "drastic protective action" and "removal stampedes"). The "risk of error" is still strongly prevalent *ab initio* in unconstitutional searches and seizures of children and improper investigative techniques that both harm children, and lead to erroneous removals.

2. *The State's Interest*

The State has two interests: (1) protecting children from genuine abuse; and (2) ensuring that children are spared harms from improper investigations. *Calabretta*, 189 F.3d at 813. "The government's interest in the welfare of children embraces not only protecting children from physical abuse, but also protecting children's interest in the privacy and dignity of their homes and in the lawfully exercised authority of their parents."

Calabretta, 189 F.3d at 820; *see also Santosky*, 455 U.S. at 766-67 ("while there is reason to believe that a nurturing parent-child relationship exists, the *parens patriae* interest favors preservation, not severance, of natural family bonds"). The State has a duty to do "no harm" to fit families. *Wallis*, 202 F.3d at 1131 ("improper governmental action may create significant injury where no problem of any kind previously existed"). Thus, the State's interests in investigation requires a respect for the presumption of parental fitness, no pre-emptive interference with the parents' maintaining custody, control, care and management over their children, and usage of best practices to reach accurate conclusions, so as not to harm the children involved or erroneously separate them from their families. .

3. *The Unlimited License Sought by the State to Interview Children without Parental Consent or Management Risks Harming the Child*

Camreta claims to have chosen the school venue to make S.G. "feel safe." (Camreta Brief 3). His stated objective failed because S.G. felt "scared" when placed into a unfamiliar room with two complete strangers, and "sick" during the seizure. (J.A. 48,54,55,58; *see also* Docket # 53, Exh. C, pp. 72.-80: S.G. described state's counsel who deposed her as "less scary" than Camreta). Camreta's motive was parental avoidance couched in theories of parental interference. Coleman, *Storming the Castle*, at 431.

The State believes that the only worthy question in this debate is "who will protect the children from parents?" Equally indispensable to the query is *"who will protect the children from the State?"* This question must be asked and answered, since the State, though constitutionally prohibited, is in essence functioning as a child's super-parent in bypassing the natural parents' consent. *See Meyer, Pierce, Yoder, Stanley, Santosky,* and *Troxel, infra.* Here, Camreta's heavy-handed interrogation of a speech delayed child for *two hours*, and repeated contradiction of her initial statements, eventually wore the child into agreeing with everything Camreta wanted to make true, just to get out of the room and not miss her school bus home—where her parents were. (J.A. 42,47-48,51-52,57-58). In the safety of her home, the child threw up five times that evening. (J.A. 43). Of course, it was S.G's parents who comforted and cared for her during that difficult time, not Camreta. "Merely because *some* intrusion on a child's protected privacy and security interests may be reasonable does not mean that *any* intrusion is." *Wallis,* 202 F.3d at 1140 (emphasis in original); *Doe*, 327 F.3d at 512.

S.G. experienced a great deal of internal turmoil; she did not understand why she was required to say bad things about her father, and she instinctively knew that what she said would have an impact on her and her sister's relationship with their family. (J.A. 57-58). However, we define the generic societal interest in "child protection," it must necessarily include protection against abuse by all authorities, and guard "the child's psychological well-being,

autonomy, and relationship to the family." *Franz*, 997 F.2d at 792.

Our Constitution treats parents as the first line of defense for children for good reason. *Troxel*, 530 U.S. at 66, citing *Parham*, 442 U.S. at 602 ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children"). Parental consent and a parent's ability to withdraw consent, as part of the whole bundle of parental rights, is what would have "protected" S.G. from any abusive "child protection" experiences.

4. *Depriving Parents of their Fundamental Liberty Interest in Consenting to, Participating in, or Terminating Child Interviews Invites Risk of Producing Inaccuracies in Fact-Finding*

The State "shares the parent's interest in an accurate and just decision." *Santosky*, 455 U.S. at 766. The State has an obligation to be searching for the truth in the most legal and reliable manner, and to employ the best and least restrictive services to arrive at "accurate" conclusions. *Santosky*, 455 U.S. at 761 ("error-reducing procedures").

Depriving parents of an opportunity to consent, watch or participate in any interview allows an investigator over the course of a multi-hour custodial interrogation to badger a child into making unreliable statements. Yet, Petitioners actually assert that "*reason*" "does not require the abrupt

termination of an abuse assessment" because "victims are reluctant." (Alford Brief 59). Camreta, an adult, intimidated a child, repeatedly challenging S.G.'s denials of inappropriate touching, by telling her, "That's not it." (J.A. 52, 71). As with Mr. Miranda, Petitioner interrogated S.G. until she emerged from the room with the evidence that he sought. (J.A. 57, 71); *Miranda v. Arizona*, 384 U.S. 436, 491-92 (1966). S.G. stated, "I had a feeling that's what he wanted to hear, just lies, not truth." (J.A. 57).

The State's interview approach, with a young, fragile, speech-delayed child, forced an involuntary and an unreliable admission to parental abuse out of desperation to regain her freedom from the seizure. *See Greene*, 588 F.3d at 1017. Assuming that every child witness will eventually "break" is hardly a mechanism for achieving "accuracy" in fact-finding. *Lassiter v. Dept. of Social Servs. of Durham Cty.*, 452 U.S. 18, 27 (1981) ("[a] parent's interest in accuracy and justice ... is ... a commanding one").

5. *The Risk of Error in Unchecked Investigatory Practices is Deterred by Safeguarding the Parental Liberty Interests in the Investigative Phase*

Since *Santosky*, case law is replete with examples of child protective investigators making unilateral decisions to violate privacy rights and parental prerogatives because such was allegedly necessary

"to protect" children.[5] Often, untrained and unobjective "investigators"[6] go unchecked in isolating children and making unilateral choices that rightfully belong to the parent(s). Where there is no parental consent or probable cause order, these

---

[5] "A reasonable inference may be drawn ... that it [is] 'standard operating procedure' to obtain [child] examinations without seeking judicial authorization or notifying the parents." *Wallis*, 202 F.3d at 1143; *Darryl H.*, 801 F.2d at 901 (strip search of child at school was seen as a significant intrusion into the child's privacy and violates the legitimate expectation of parents that their familial relationship will not be subject to unwarranted state intrusion); *Calabretta*, 189 F.3d at 820 ("there is a very substantial interest, which forcing the mother to pull the child's pants down invaded, in the mother's dignity and authority in relation to her own children in her own home"); *Franz*, 997 F.2d at 785 (police officer photographed child's vaginal area without parents knowledge); *Roe*, 299 F.3d at 397 (suggestive dancing by six year old girl led social worker to pressure mother into allowing her genitals to be spread and photographed); *Van Emrik v. Chemung County Dept. of Social Services*, 911 F.2d 863 (2nd Cir. 1990) (parents brought child to hospital suspecting that their babysitter was responsible for spiral fracture of right leg; social worker without parental consent had doctor perform x-rays to determine if older injuries to child existed); *Tenenbaum*, 193 F.3d at 598 (secreting child to the hospital for a vaginal exam without parental consent).

[6] *See Tenenbaum*, 193 F. 3d at 590 (misinterpreting selectively mute child answering "no" to everything even when certain questions would have required an affirmative answer to be patently true); *Doe*, 327 F.3d at 523 (misinterpreting nonexcessive corporal punishment as child abuse); *Wallis*, 202 F.3d at 1134 (waking up sleepy child at midnight for an interview only to misinterpret a story about a "spider" as meaning possible sexual abuse); *Franz*, 997 F.2d at 786 (misinterpreting diaper rash from wet pamper as possible sexual abuse); *Calabretta*, 189 F.3d at 813 (child crying "no, no, no" could have multiple interpretations, including disliking vegetables).

investigative "judgment calls" are not even reviewable. "Respecting privacy and conducting the sort of comprehensive investigation the system contemplates are inherently irreconcilable, at least when delegated to a single official." Coleman, *Storming the Castle* at 439-40.

Having parental involvement/oversight keeps state investigators honest. *Dubbs*, 336 F.3d at 1207 ("the requirement ... of parental consent in the case of minor children, serves important practical as well as dignitary concerns, even when a social welfare agency ... believes it is acting for the good of the child"). It is a meaningful check on the State's amnesiac tendencies to remember that the mission of child protection also embraces the duty to not harm the child during questioning or in erroneously separating her from her fit family. *Wallis*, 202 F.3d at 1130-31; *Stanley*, 405 U.S. at 653; *Calabretta*, 189 F.3d at 820. Having a parent nearby provides a watchful eye against misconduct/deception—was the child intimidated, coaxed, improperly led into stating a mistruth, or provided an implanted memory by repetitive questioning? Otherwise, "[i]ll-considered and improper governmental action may create significant injury where no problem of any kind previously existed." *Wallis*, 202 F.3d at 1130-31.

The constitutional limitations placed on law enforcers specializing in child protection should be no different than the limitations placed on other law enforcement, especially given the identity of those whom they regularly interrogate. Access to impressionable children, whose lives and dignity are inextricably intertwined with their parents, should

not be made easier, but be subject to more formalized processes to protect the high value of the constitutional rights at stake. "The individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state." *Santosky*, 455 U.S. at 768 (citing *Addington v. Texas*, 441 U.S. 418, 427 (1979)); *M.L.B.*, 519 U.S. at 121 ("we inspect the character and intensity of the individual interest at stake, on the one hand, and the State's justification for its exaction, on the other"); *Stanley*, 405 U.S. at 658 ("convenien[ce for the State to] "presume [rather] than to prove ... is insufficient ... when the issue at stake is the dismemberment of his family"). Preserving the fundamental liberty interest of parents will substantially reduce the risk of arbitrary and grossly subjective acts by child protective investigators.

6. *The Government's Limited Interest in Children is not being Hampered, but Advanced, by Securing Parental Consent or a Warrant*

Petitioners represent that "bleak statistics" and "staggering proportions" of child abuse should endorse a rule for child seizures requiring "scant judicial oversight." (Alford Brief 20, 32). "[C]ases of this order 'cannot be resolved by resort to easy slogans and pigeonhole analysis." *M.L.B.*, 519 U.S. at 120. Touting the "protection of children" is easy to appreciate. *Roe*, 299 F.3d at 406-07; *Meyer*, 262 U.S. at 401-02. But the "means adopted [must not] exceed the limitations upon the power of the State

and conflict with rights assured to [the family] in error." *Meyer*, 262 U.S. at 402.

Here, the "private interest is commanding," while the "governmental interest ... is comparatively slight." *Santosky*, 455 U.S. at 760-61. This is not simply a debate of balancing the child's interests against the State's interest in protecting the child, as narrowly framed by both Camreta and Alford. *Parham*, 442 U.S. at 600 ("the private interest at stake is a combination of the child's and parents' concerns"); *M.L.B.*, 519 U.S. at 119 (the parent "maintains that the accusatory state action she is trying to fend off is barely distinguishable from criminal condemnation in view of the magnitude and permanence of the loss she faces"). Camreta and Alford conveniently ignore the child and parents' *shared* interest in maintaining familial integrity, as well as the parental liberty interest in child management, and the government's duty to ensure that children are not harmed by its own actions. *Santosky, Stanley, Wallis, Calabreta, infra*. A closed door, multi-hour interrogation of an impressionable, speech-impaired child by a perfect stranger not only harms the child immediately, but also long term when the child discovers that what was cajoled out of her severed her family. Children like S.G. are not just disinterested witnesses, but have a personal stake in the outcome. Compare *Illinois v. Lidster*, 540 U.S. 419 (2004) (warrant unnecessary where *adult* road-stop witness' statements would have absolutely no consequence, criminal or otherwise, for the witness herself).

The Petitioners contend that notifying parents **and** seeking their consent, or securing a warrant impedes the State in its investigations. They demand unchecked "flexibility" and "swiftness" in the execution of their described duties. (Alford Brief 48). But in *truly* exigent circumstances, investigators always retain the power to seize a child without a court order. *Tenenbaum, Doe, infra.* Thus, Petitioners' frustration rings hollow.

Petitioners unreasonably ask this Court to accept as a constitutional foundation for its interference with the Greene parents rights their speculation regarding the motives of all parents suspected of abuse. But it is wrong to presume that *all* parents under suspicion will refuse consent to interview a child or interfere with an investigation. Coleman, *Storming the Castle* at 430-31 ("most investigations, over 90 percent by some estimates, are conducted with the apparent consent of relevant adults"); *cf. Stanley*, 405 U.S. at 654 (refusing to label "all unmarried fathers" as "unsuitable"). Contrary to the State's speculation regarding the denial of consent, Sarah Greene answered Camreta's questions during the home visit and gave him physical access to view S.G.'s bedroom door knob. (J.A. 48, 50).

> Procedure by presumption is always cheaper and easier than individualized determination. But ... it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand.

Stanley, 405 U.S. at 656-57; *see also Sankaran, Parens Patriae Run Amuck, passim* (due process violation to lump together *both* parents and deprive *both* of custody, control, and management of their children, when allegations are only against *one* parent); *Wallis*, 202 F. 3d at 1142 ("The government may not, consistent with the Constitution, interpose itself between a fit parent and her children simply because of conduct—real or imagined—of the other parent"). Contrary to interfering with the truth, Sarah Greene pursued the truth, repeatedly approaching S.G. to make sure that there was no abuse that had escaped her maternal attention. (J.A. 43-44).

Finally, "there is a critical difference between necessary latitude and infinite license." *Tenenbaum*, 193 F.3d at 595. Petitioners argue that they cannot "develop[ ] probable cause" against parents without cutting constitutional corners in their schoolhouse seizures. (Camreta Brief 11). The violation of familial privacy and the disregard of parental liberty interests cannot provide a posterior justification for an otherwise unconstitutional investigation. "The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency." *Stanley*, 405 U.S. at 656.

> In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the

> omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means-to declare that the government may commit crimes in order to secure the conviction of a private criminal-would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

Olmstead v. U.S., 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

So, Petitioners ask for a lower threshold, *i.e.*, that "any apprehension" meriting "prompt attention" is the equivalent of the probable cause requirement. (Alford Brief 44). Employing this standard would allow any agent of the state to search and seize any child for any length of time, at any place, and at any hour, as reasonable *per se*. *Cf. Tinker*, 393 U.S. at 508 (criticizing "undifferentiated fear or apprehension" as being an unreasonable basis to overlook fundamental right). Such a standard is entirely too broad to be constitutional.

The Petitioners were entitled to constitutionally investigate through securing a court order. The State knew about Nimrod Greene's *alleged* post-drinking friskiness on or about

February 10, 2003 from the Smiths who left their son alone with him despite having such prior knowledge. Yet, the State did not interview S.G. until February 24, 2003, *almost two weeks later*. Camreta personally let four days pass from notice.[7] Clearly, the State perceived no immediacy or exigency from these internally flawed allegations. Under these facts, had the State sought a warrant, and assuming *arguendo* probable cause was established, it is unlikely that the warrant would allow Camreta to seize and interrogate the child as he did. *Tenenbaum* at 594 ("judicial contribution makes a fundamental contribution to the proper resolution of the tension among the interest"). Of course, submitting to a neutral magistrate always runs the risk of being told no, which could be the motive here than the proffered need for swiftness and flexibility. *Doe*, 327 F.3d at 513 (the "failure [to seek a warrant] speaks volumes").

Alternatively, the State could secure parental consent before questioning the child. *Dubbs*, 336 F.3d at 1215 ("parental notice and consent is [not] "impracticable" in this context, which is the requirement for a special needs exception to the

---

[7] The claimed need for swiftness is often betrayed by the sheer number of days that elapse between the initial tip and the subsequent seizure. *Calabretta*, 189 F.3d at 813 (14 days as investigator went on vacation after receiving tip); *Wallis*, 202 F.3d at 1132-33 (4 days elapsed from social workers receiving report from therapist of psychotic relative rambling about child sacrifice rituals to seizing the children); *Doe*, 327 F.3d at 501-02 ("nearly two weeks later" for the first reported spankee, and "[f]inally more than three months" for the second identified spankee); *Tenenbaum*, 193 F.3d at 588-90 (5 days from the initial report by a mandatory reporter to seizing child).

Fourth Amendment"). Instead the State impugns the motives of *all* parents across the board as a basis to avoid obtaining parental consent.

Child protective investigators should seek to operate within all constitutional constraints if committed to serving the long-term interests of children. *Weis v. State*, 800 N.E.2d 209 (Ind. App. 2003) (suppressing evidence of poor housekeeping on a charge of criminal neglect of a dependent, where there was no emergency to create the exigent circumstances to permit a warrantless entry into a dirty home); *Kazery v. State*, 995 So. 2d 827 (Miss. 2008) (social service work should reflect a desire for reliable prosecution outcomes by using best practices in limiting child interviews to trained forensic interviewers). Honoring parental prerogatives can only strengthen a State's interest in prosecuting proscribed conduct by having legally obtained evidence through a consensual search. Similarly, "requiring caseworkers to obtain the equivalent of a warrant before searching ... ensures that the constitutional interests of the child, parents, and schools, are safeguarded, while at the same time preserving the state's compelling interest in protecting children from being abused." *Doe*, 327 F. 3d at 514.

CONCLUSION

Schools have long served as battlegrounds where the State has competed for children by encroaching upon the fundamental liberty interests belonging to parents. Constitutionally unrestrained investigations are fraught with peril for children and

for their parents who love them. In an isolated school setting, the State is essentially unfettered in its ability to control children, thereby stripping parents of their presumption of fitness firmly ensconced in this Court's case law. "Any apprehension" is not a constitutionally sufficient basis for subverting parents' interest in maintaining custody, control and management over their children. Hanging in the balance of this struggle is the shared interest that children and parents have in maintaining the integrity of their natural family. For these reasons, *amici* support the position of the Respondent, the Greene family.

Respectfully submitted,

GARY S. MCCALEB
BRIAN W. RAUM
ALLIANCE DEFENSE FUND
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

DEBBIE MAKEN
ATTORNEY AT LAW
7924 Cranes Pointe Way
West Palm Beach, FL
33412
(561) 685-4505

DAVID AUSTIN R. NIMOCKS
Counsel of Record
ALLIANCE DEFENSE FUND
801 G Street, N.W.
Suite 509
Washington, D.C. 20001
(202) 393-8690
animocks@telladf.org

January 31, 2011

Docket 09-1454, 09-1478

In the Supreme Court of the United States

Bob Camreta,

Petitioner,

v.

Sarah Greene, Personally and as Next Friend for S.G., a Minor and K.G., a Minor,

Respondents,

James Alford, Deputy Sheriff, Deschutes County, Oregon,

Petitioner,

v.

Sarah Greene, Personally and as Next Friend for S.G., a Minor and K.G., a Minor,

Respondents.

On Writs of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF JUVENILE LAW CENTER, *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Mae C. Quinn
Civil Justice Clinic
Washington University in St. Louis School of Law
One Brookings Drive
St. Louis, MO 63130
314-935-6088
mquinn@wulaw.wustl.edu

Marsha Levick*
**Counsel of Record*
Jennifer Pokempner
Lourdes Rosado
Juvenile Law Center
1315 Walnut St., 4th Fl.
Philadelphia, PA 19107
215-625-0551
mlevick@jlc.org

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

INTRODUCTION 4

I. S.G. WAS SEIZED WHEN SHE WAS USHERED FROM HER CLASSROOM TO A CLOSED ROOM WHERE SHE WAS QUESTIONED BY A SOCIAL WORKER AND LAW ENFORCEMENT OFFICER FOR TWO HOURS 8

II. THE SEIZURE AND INTERROGATION OF S.G. AT SCHOOL WITHOUT A WARRANT OR PROBABLE CAUSE VIOLATED THE FOURTH AMENDMENT 12

A. Law Enforcement Requires a Warrant of Probable Cause to Seize and Question a Child in School 14

B. Petitioners Fail to Demonstrate That Any of the Exceptions to the Fourth Amendment Warrant Requirements Were Present 15

1. S.G.'s seizure by law enforcement was not a special needs search and seizure conducted by school personnel acting on their own for the purposes of maintaining school discipline and order 15

2. The seizure and interrogation of S.G. was directly related to law enforcement purposes and thus does not qualify as a special needs search under this Court's jurisprudence 18

3. Law enforcement officials lacked consent to seize and interrogate nine year-old S.G. 21

a. Under the totality of the circumstances, no lawful, voluntary consent was ever provided for S.G.'s seizure and interrogation 23

b. School officials may not consent to a student's seizure and questioning by government officials conducting an investigation 26

4. No exigent circumstances justified S.G.'s seizure and interrogation 29

C. The Reasonableness Test Applied by this Court in *Illinois v. Lidster* Cannot Be Applied to The Two Hour Seizure of S.G. 31

D. Even If The Court Categorizes The Seizure Of S.G. As A Special Needs Seizure Or A Limited Stop, The Seizure Was Neither Justified At Its Inception Nor Reasonable In Its Scope 33

CONCLUSION 37

APPENDIX A A1

TABLE OF AUTHORITIES

Supreme Court Cases

Alderman v. U.S. , 394 U.S. 165 (1968) 24

Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002) 15, 20

Brigham City, Utah v. Stuart, 547 U.S. 398 (2006) 30

Brown v. Bd. of Education of Topeka, 347 U.S. 483, 493 (1954) 5

Chandler v. Miller, 520 U.S. 305 (1997) 15, 18, 21

City of Indianapolis v. Edmond, 531 U.S. 32 (2000) 15, 21

Cupp v. Murphy, 412 U.S. 291 (1973) 29

Dunaway v. New York, 442 U.S. 200 (1979) 31, 32

Ferguson v. City of Charleston, 532 U.S 67 (2001).... ..... 18, 19, 20

Florida v. Bostick, 501 U.S. 429 (1991) 9, 10, 11

Florida v. Royer, 460 U.S. 491 (1983) 22, 23, 28, 32

Gallegos v. Colo., 370 U.S. 49 (1962) 24

Griffin v. Wisconsin, 483 U.S. 868 (1987) 18

Henry v. United States, 361 U.S. 98 (1959) 13

I.N.S. v. Delgado, 466 U.S. 210 (1984) 9, 10, 11

Illinois. v. Lidster, 540 U.S. 419 (2004) 31, 32, 33, 34, 35

Ingraham v. Wright, 430 U.S. 651 (1977) 28

Katz v. U.S., 389 U.S. 347 (1967) 14

Mich. v. Tyler, 436 U.S. 499 (1978) 30

Michigan v. Chesternut, 486 U.S. 567 (1988) 8

Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) 20, 33

New Jersey v. T.L.O., 469 U.S. 325 (1985) .....passim

O'Connor v. Ortega, 480 U.S. 709 (1987) 21

Safford Unified Sch. Dist. 1 v. Redding, 129 S.Ct. 2633 (2009) 26

Santosky v. Kramer, 455 U_S. 745 (1982) 26

Schmerber v. Cal., 384 U.S. 757 (1966) 29

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) .....passim

Skinner v. Railway Labor Executives' Assn., 489 U.S. 602 (1989) 19, 20

Terry v. Ohio, 392 U.S. 1 (1968) .....passim

Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503 (1969) 26

U.S. v. Santana, 427 U.S. 38 (1976) 29

United States v. Mendenhall, 446 U.S. 544 (1980) ..... passim

United States v. Place, 462 U.S. 696 (1983) 31, 34, 35

Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) ..... passim

Warden Md. Penitentiary v. Hayden, 387 U.S. 294 (1967) 29

Washington v. Glucksberg, 521 U.S. 702 (1997) 26

West Virginia State Bd. Of Education v. Barnette, 319 U.S. 624 (1943) 5

Wis. v. Yoder, 406 U. S. 205 (1972) 26

Other Federal Cases

Calabretta v. Floyd, 189 F. 3d 808 (9th Cir. 1999) .. 20

Couture v. Bd. of Educ. of Albuquerque Pub. Sch., 535 F.3d 1243 (10th Cir. 2008) 10

Doe v. Heck, 327 F.3d 492 (7th Cir. 2003) 11, 24

Franz v. Lytle, 997 F.2d 784 (10th Cir. 1993) 37

Greene v. Camreta, No. Civ. 05-6047-AA, 2006 WL 758547 (D. Or. March 23, 2006) 23

Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009) ..... passim

Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir. 1982) 27, 28

Jones v. Hunt, 410 F. 3d 1221 (10th Cir. 2005). 17, 25

Picha v. Wielgos, 410 F.Supp. 1214 (N.D. Ill. 1976).....26

Roe v. Tex. Dept. of Protective and Regulatory Servs., 299 F. 3d 395 (5th Cir. 2002) 21

Shuman ex rel. Shertzer v. Penn Manor Sch. Dist., 422 F.3d 141 (3rd Cir. 2005) 11

Tarter v. Raybuck, 742 F.2d 977 (6th Cir. 1984) 25

Tenenbaum v. Williams, 193 F.3d 581 (2d Cir. 1999) 27

Wofford v. Evans, 390 F.3d 318 (4th Cir. 2004)..... 11

State Cases

In re Jamol F., 24 Misc. 3d 772 (N.Y. Fam. Ct. 2009) 28

In re Randy G., 28 P.3d 239 (Cal. 2001) 16

People v. Assad, 189 Cal. App. 4th 187 (Cal. App. 3d Dist. 2010) 7

State Statutes and Regulations

Cal. Penal Code § 11174.3(a) (West 2001)..... 7

Cal. Welf. & Inst. Code § 305(a)(West 2010) 7

Or. Admin. R. 413-015-0420(1)(2010) 6

Or. Admin. R. 413-015-0210(2)(2010) 6

Or. Admin. R. 413-015-0210(3)(2010) 6

Or. Rev. Stat. § 419.150(1) (2009) 7

Or. Rev. Stat. § 419B.150(2) (2009) 6

Other Authorities

3 Wayne R. Lafave, Search & Seizure § 5.1 (4th ed. 2010) 13

4 Wayne R. LaFave, Search & Seizure § 9.2 (4th ed. 2010) 32

Bend-La Pine Sch. Dist. Policy on Student Conduct and Discipline (Jan 8, 2007), http://www.bend.k12.or.us/education/components/docmgr/default.php?sectiondetailid=747&fileitem=1149&catfilter=146&PHPSESSID=2a3ee96e596f0ddcdc3baadcbfb9cadc 28

Brief for Cal. State Ass'n of Counties et al. as Amici Curiae Supporting Petitioners, *Camreta v. Greene*, 2010 WL 2665553 (No. 09-1454) 7, 8, 9, 13, 35

Brief for Nat'l School Bds. Ass'n et al. as Amici Curiae Supporting Petitioners, *Camreta v. Greene*, 2010 WL 5168881 (No. 09-1454, 09-1478) 8, 9

Brief for Solicitor Gen. as Amicus Curiae Supporting Petitioners, *Camreta v. Greene*, 2010 WL 5168879 (No. 09-1454, 09-1478). 9

Brief for Nat'l Assn of Soc. Workers et al. as Amici Curiae Supporting Petitioners, *Camreta v. Greene*, 2010 WL 5168877 (No. 09-1454, 09-1478)..... 13

Dean Hill Rivkin, *Truancy Prosecutions and the Right [to] Education*, Duke Forum for L. & Soc. Change (forthcoming Spring 2011)..... 28

Petition for Writ of Certiorari, *Camreta v. Greene*, 2010 WL 2190432 (No. 09-1454)..... 12

INTEREST OF *AMICI*

Amici Juvenile Law Center et al. work on issues of child welfare, juvenile justice, and children's rights. *Amici* have particular expertise in the area of children's constitutional rights, especially with regard to children's interaction with the child welfare and juvenile justice systems and the promotion of their well being through these systems. *Amici* join to urge this Court to affirm the decision of the Ninth Circuit in this case. Affirmance of the decision below will ensure continued robust protection of children's Fourth Amendment rights without impeding investigations of suspected child abuse or endangering children's safety.[1]

---

[1] The consent of counsel for all parties is on file with the Court. No counsel for a party authored this brief in whole or in part. No person or entity, other than *Amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief. A brief description of all *Amici* appears at Appendix A.

SUMMARY OF ARGUMENT

The Ninth Circuit correctly found that the seizure and questioning of nine year old S.G. by Petitioners Camreta and Alford was an unconstitutional seizure in violation of the Fourth Amendment. The Ninth Circuit's decision is narrowly crafted to address the specific circumstances of this seizure and is fully consistent with this Court's Fourth Amendment jurisprudence.

The touchstone of the Fourth Amendment is reasonableness, generally demonstrated by a warrant, probable cause or consent. Narrow exceptions to these requirements have been carved out, including exigent circumstances and special needs searches. Brief investigatory stops have also been deemed permissible without a warrant or probable cause. None of these exceptions are present here, and any divergence from a traditional Fourth Amendment analysis is unjustified. Nine year old S.G. was improperly removed from her school classroom, taken to a closed office by Petitioners without a warrant, probable cause or consent, and then asked repeatedly about the most intimate details of her private family life for two hours. S.G. was not free to terminate this encounter nor was this the type of brief and non-intrusive encounter categorized as a *Terry* stop.

First, the special needs exception to the Fourth Amendment is inapplicable. Reduced Fourth Amendment scrutiny of searches and seizures of students is permissible to further the purposes of maintaining order and discipline in the school

environment so that children can learn. School officials were not involved in S.G.'s seizure, and S.G. was suspected of no violation of school rules. Rather, the seizure was pervaded by a law enforcement purpose—the criminal investigation of S.G.'s parent. Second, neither the circumstances surrounding the seizure nor the actions of state officials subsequent to the encounter indicate that emergency action was required to safeguard S.G.'s safety and well being. No exigent circumstances were present.

Finally, consent to the seizure was neither sought from nor provided by either S.G. or her mother. While schools have some *in loco parentis* authority, the school had no authority to substitute its consent for that of S.G. or her mother here.

ARGUMENT

INTRODUCTION

The Fourth Amendment protects individuals from unreasonable searches and seizures by governmental actors, generally requiring either a warrant or probable cause before such actors may undertake a search or seizure of an individual. The Constitutional guarantees embedded in the Fourth Amendment strike a delicate balance between the rights of individuals against arbitrary or unreasonable government actions with the government's interest in investigating crime and promoting the public welfare. Over time, exceptions to the warrant requirement have been adopted by this Court, to permit law enforcement to fulfill their responsibility to promote public safety without unnecessarily trampling the rights of the individual.

Petitioners and their *Amici* seek through this case to drastically circumscribe the applicability of the Fourth Amendment to children who are seized and questioned on school property about suspected child abuse. Petitioners suggest that children in school cannot be 'seized' within the meaning of the Fourth Amendment because their freedom of movement is inherently restricted by both their minority status and the restrictions associated with compulsory school attendance. Combined with the state's interest in investigating and eliminating child abuse, Petitioners urge a new Fourth Amendment exception that would effectively foreclose challenges to the seizure and interrogation of children behind school doors.

This case thus tests the boundaries of the Fourth Amendment as it applies to children in the very institutions that play a central role in promulgating the values of our constitutional democracy through instruction as well as by example. *See e.g.*, *West Virginia State Bd. Of Education v. Barnette*, 319 U.S. 624, 637 (1943) ("That [schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."); *Brown v. Bd. of Education of Topeka*, 347 U.S. 483, 493 (1954) ("Compulsory school attendance laws . . . demonstrate the importance of education to our democratic society. . . . It is the very foundation of good citizenship.") It is thus through the educational system that our children learn the moral, social and civic values that drive the interaction between citizens and government. While this Court has recognized that juvenile status may inform legal status, no decision from this Court suggests that school children forfeit their rights to our most fundamental constitutional guarantees merely by crossing the school threshold. No such sweeping erosion of children's Fourth Amendment rights is justified.

Amici Juvenile Law Center *et al.* thus urge this Court to uphold the Ninth Circuit's ruling that S.G.'s warrantless seizure and questioning by Petitioners Camreta and Alford violated the Fourth Amendment. The Ninth Circuit's decision is fully

consistent with this Court's jurisprudence, and will not hinder timely investigations of suspected child abuse.[2] Indeed, the Ninth Circuit decision is narrow, imposing Fourth Amendment strictures on a child abuse investigation only where the nature, scope and procedures surrounding the seizure bar Petitioners from claiming that the Fourth Amendment is inapplicable. While Oregon, like all states, provides a mechanism for prompt investigation and other action when a child's welfare reasonably appears to be in jeopardy, these statutes are not a license to seize children or traumatize them in the course of fulfilling this legislative purpose.

The specter of harm to children raised by Petitioners and their *Amici* as a consequence of the Ninth Circuit decision is both overblown and illusory. A ruling affirming the Ninth Circuit decision does not implicate routine child abuse investigations as

---

[2] Oregon regulations require that a child protection "assessment" be conducted within five days upon receipt of a child abuse report where the alleged abuser is a legal parent of the child, resides in the child's home, or potentially has access to the child. Or. Admin. R. 413-015-0210(2) and (3)(2010). As part of that assessment, the DHS worker must "have face-to-face contact with and interview the alleged victim...to gather information regarding possible child abuse and neglect, assess if the children are vulnerable to identified safety threats, and assess the children's immediate safety." *Id.* at 413-015-0420(1)(a). Additionally, the juvenile court can issue a protective custody order based on the sworn affidavit of a Department of Human Services (DHS) employee "that sets forth with particularity the facts and circumstances on which the request for protective custody is based, why protective custody is in the best interests of the child and the reasonable efforts . . . made by the department to eliminate the need for protective custody of the child." Or. Rev. Stat. § 419B.150(2) (2009).

required by state and federal law. The Fourth Amendment protections *Amici* urge this Court to enforce will neither hinder those investigations nor endanger the lives of children.[3]

---

[3] *Amici* for the Petitioners California State Association of Counties cite *People v. Assad*, 189 Cal. App. 4th 187 (Cal. App. 3d Dist. 2010), for the proposition that imposing Fourth Amendment requirements on child interviews at school would undermine child protection investigations. *See* Brief for California State Ass'n of Counties et al. as Amici Curiae Supporting Petitioners at 28, *Camreta v. Greene*, 2010 WL 2665553 (No. 09-1454). Their reliance on *Assad* is misplaced. Under California law, once the child protection agency receives a report of suspected child abuse from a school, a worker is authorized to interview the child at his school and visually confirm the child's physical injuries. Cal. Penal Code § 11174.3(a) (West 2001) ("Whenever a representative of a government agency investigating suspected child abuse or neglect or the State Department of Social Services deems it necessary, a suspected victim of child abuse or neglect may be interviewed during school hours, on school premises. . .") The worker does not need a court order to interview the child. Based on his or her experience and expertise, the worker could conclude that a child's explanation of how he was injured did not adequately explain the injuries, giving rise to reasonable cause to suspect that the child was abused and at further risk of abuse if there is no state intervention. If the worker reaches this conclusion, California law plainly authorizes law enforcement to take the child into protective custody. Cal. Welf. & Inst. Code § 305(a) (West 2010). In Oregon the worker is likewise authorized to take custody of the child. Or. Rev. Stat. § 419.150(1) (2009).

I. S.G. WAS SEIZED WHEN SHE WAS USHERED FROM HER CLASSROOM TO A CLOSED ROOM WHERE SHE WAS QUESTIONED BY A SOCIAL WORKER AND LAW ENFORCEMENT OFFICER FOR TWO HOURS

Petitioners conceded below and do not contest here the district court's finding that S.G.'s two hour interview was a seizure within the meaning of the Fourth Amendment. *Greene v. Camreta*, 588 F.3d 1011, 1022 (9th Cir. 2009). Several of Petitioners' *Amici* nevertheless suggest that S.G.'s questioning was not a seizure under the Fourth Amendment and have effectively asked this Court to issue an advisory opinion on this issue. *See, e.g.*, Brief for Cal. State Ass'n of Counties et al. as Amici Curiae Supporting Petitioners at 3; Brief for Nat'l School Bds. Ass'n et al. as Amici Curiae Supporting Petitioners at 5, *Camreta v. Greene*, 2010 WL 5168881 (No. 09-1454, 09-1478). Petitioners' *Amici* misstate the applicable law.

A seizure occurs when, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980); *see also Michigan v. Chesternut*, 486 U.S. 567, 573 (1988) (A seizure occurs for Fourth Amendment purposes when "a reasonable person would have believed that he was not free to leave.") In this case, nine year old S.G. was taken from her class to a private, closed office where she was questioned about intimate details of her family life for approximately two hours by an unfamiliar DHS

worker and law enforcement officer. Because no reasonable nine year old would have felt free to either leave the office or refuse to speak with these two public officials, she was "seized" subject to Fourth Amendment requirements.

Certain *Amici* for Petitioners argue that, because a child's liberty is already substantially limited in school, the Fourth Amendment is not implicated unless law enforcement's actions restrict movement more than the restrictions created by everyday compulsory school attendance. *See, e.g.*, Brief for Solicitor Gen. as Amicus Curiae Supporting Petitioners at 30-31, *Camreta v. Greene*, 2010 WL 5168879 (No. 09-1454, 09-1478); Brief for Cal. State Ass'n of Counties at 16-19; Brief for Nat'l School Bds. Ass'n at 6. However, S.G.'s enrollment in school is only one part of the analysis. As this Court has said, "[w]here the encounter takes place is *one factor*, but it is not the only one." *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (emphasis added). Plainly, some locations, including schools, inherently restrict movement, but this does not preclude a determination that a seizure has nevertheless taken place. *Florida v. Bostick* and *I.N.S. v. Delgado*, 466 U.S. 210 (1984), relied upon by Petitioners' *Amici*, are readily distinguishable.

In *Bostick*, an encounter with law enforcement "in the cramped confines of a bus" where "there is little room to move around" did not automatically transform that encounter into a seizure. *Bostick*, 501 U.S at 435. Similarly, in *Delgado*, this Court held that a raid by immigration officials at a factory is not a seizure simply because it occurs in a confined place

where one works. As the Court noted, "[o]rdinarily, when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers." *Delgado*, 466 U.S. at 218. In such situations, where movement is restricted by the nature of the location, the Court has held that the "the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Bostick*, 501 U.S. at 436. Applying this test here, nine year old S.G., taken from her classroom by a DHS worker and a uniformed, armed law enforcement officer was subject to restraint beyond that associated with simply attending school.

Moreover, the *Bostick* bus passenger and *Delgado* factory workers were adults who chose to be in the locations where their freedom of movement was restricted. The fact that nine year old S.G. was required to attend school and involuntarily subjected to certain inherent restrictions on her freedom of movement plainly distinguishes the instant case from the reasoning of *Bostick* and *Delgado*. For much of their minority, children are compelled to attend school and their physical movement is limited by school officials throughout the structured school day. *See Couture v. Bd. of Educ. of Albuquerque Pub. Sch.*, 535 F.3d 1243, 1250-51 (10th Cir. 2008) ("We must think about seizures differently in the school context, as students are generally not at liberty to leave the school building when they wish.") As this Court has recognized, "unemancipated minors lack some of the most fundamental rights of self-determination - including even the right of liberty in

its narrow sense, i.e., the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995). However, the restrictions on the movement of students within the school setting do not render the protections of the Fourth Amendment inapposite. Where a reasonable person even in school would not feel free to leave or terminate the encounter, courts have found violations of the Fourth Amendment. *See id.* at 1251 (holding that a seizure occurred when school officials placed a student in a separate room alone for varying times); *Shuman ex rel. Shertzer v. Penn Manor Sch. Dist.*, 422 F.3d 141, 147 (3d Cir. 2005) (student who was told to remain in conference room by school officials for several hours was seized); *Wofford v. Evans*, 390 F.3d 318, 325 (4th Cir. 2004) (student who was removed from class by school officials and questioned by the principal and others on two occasions was seized).

Unlike the adults in *Bostick* and *Delgado*, S.G. was not questioned in a location to which she had "voluntarily" taken herself but rather was taken from her regular classroom to a "private office," *Camreta*, 588 F. 3d at 1017, where she was questioned for two hours by non-school personnel about private, non school-related matters. Under these circumstances, S.G. was seized. A contrary conclusion would nullify the Fourth Amendment's protections for schoolchildren. Indeed, the circumstances of S. G.'s seizure are indistinguishable from those found in *Doe v. Heck*:

> [The child] was escorted from class by Principal Bond, the defendant caseworkers, and a uniformed police officer, into the church's nursery (which was empty). He was then questioned by [two child welfare caseworkers], with the uniformed police officer present, for twenty minutes about intimate details of his family life. Under these circumstances, we conclude that John Jr. was "seized" with the meaning of the Fourth Amendment because no reasonable child would have believed that he was free to leave the nursery.

327 F.3d 492, 510 (7th Cir. 2003). Because the nine year old S.G. felt neither free to leave the office nor to terminate the encounter with Alford and Camreta, she was undeniably seized.

II. THE SEIZURE AND INTERROGATION OF S.G. AT SCHOOL WITHOUT A WARRANT OR PROBABLE CAUSE VIOLATED THE FOURTH AMENDMENT

S.G.'s seizure violated the Fourth Amendment.[4]

---

[4] Petitioners and their *Amici* come dangerously close to implying that the Fourth Amendment protects only those accused of crimes by emphasizing that S.G. was not suspected of wrongdoing and was only interviewed as a potential witness and victim to a crime. *See, e.g.*, Petition for Writ of Certiorari, *Camreta v. Greene*, 2010 WL 2190432 at *1 (No. 09-1454) ("The Ninth Circuit thus imported the standard used to evaluate the constitutionality of seizures of suspected criminals and imposed it on interviews of potential witnesses"); Brief for Cal. State

As a general matter, a search or seizure must be supported by a warrant, probable cause, or one of the warrant exceptions, such as exigent circumstance, consent, or a special needs search, to be deemed reasonable under the Fourth Amendment. As described in detail below, S.G.'s seizure met none of the exceptions to the Fourth Amendment's warrant/probable cause requirements. Nor can the seizure be characterized as a brief investigatory stop. Finally, even if this Court were to find the warrant/probable cause requirement inapplicable to the instant case, this Court's special needs exception

---

Ass'n of Counties at 5; Brief for Nat'l Assn of Soc. Workers et al. as Amici Curiae Supporting Petitioners at 7, *Camreta v. Greene*, 2010 WL 5168877 (No. 09-1454, 09-1478) ("The Ninth Circuit standard . . . was designed to protect the rights of criminal suspects . . ."). However, the Fourth Amendment protects the rights of all citizens, not only those who are accused of crimes. Of course, criminal defendants may seek the exclusion at trial of any statements or evidence obtained in violation of the Fourth Amendment. "Because of the exclusionary sanction, the Fourth Amendment is more commonly thought of as a limitation on the power of police to search for and seize evidence, instrumentalities, and fruits of crime. However, *the Amendment also protects the 'right of the people to be secure in their persons,'* and it is clear that an illegal arrest *or other unreasonable seizure of the person is itself a violation of the Fourth Amendment*." 3 Wayne R. Lafave, Search & Seizure § 5.1 (4th ed. 2010) (emphasis added) (citing *Terry v. Ohio*, 392 U.S. 1 (1968); *Henry v. United States*, 361 U.S. 98 (1959). Indeed, this Court has rejected "the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a 'technical arrest' or a 'full-blown search.'" *Terry*, 392 U.S. at 19. For these individuals, the remedy for a violation of his/her Fourth Amendment rights is a civil rights action, as was undertaken in this case.

is also inapplicable, as it was neither justified at its inception nor reasonable in its scope. *N.J. v. T.L.O.*, 469 U.S. 325, 342 (1985).

A. Law Enforcement Requires a Warrant or Probable Cause to Seize and Question a Child in School

The Ninth Circuit correctly held that seizure of a nine year old child at school by an armed police officer accompanying a state child welfare agent for two hours of questioning – absent a warrant, court order, exigent circumstances, or consent – was unconstitutional under the Fourth Amendment. *Camreta*, 588 F.3d at 1030. The question before this Court is "whether an in-school seizure and interrogation of a suspected child abuse victim is always permissible under the Fourth Amendment without probable cause and a warrant or the equivalent of a warrant," *id.* at 1022, *when there is "direct law enforcement purpose" and "involvement of law enforcement personnel."* *Id.* at 1027 n.12 (emphasis added). The application of the Fourth Amendment to administrative child abuse investigations generally is *not* before the Court.

The Fourth Amendment requires that all searches and seizures be reasonable; generally, probable cause or a warrant is required to demonstrate reasonableness. *Katz v. U.S.*, 389 U.S. 347, 357 (1967). In only a few exceptional situations has this Court found a search valid under the Fourth Amendment by law enforcement absent a warrant or

probable cause. These exceptions constitute a "closely guarded category" that this Court will not expand without great caution. *Chandler v. Miller*, 520 U.S. 305, 309 (1997). Special needs, administrative searches of limited scope in highly regulated industries, and stops or searches of motorists in certain specific situations, particularly when related to border enforcement, *see e.g., City of Indianapolis v. Edmond*, 531 U.S. 32, 37-38 (2000), fall within this "closely guarded category." As discussed in further detail below, the two-hour seizure of nine year old S.G. by Petitioners does not fit any of the narrow exceptions recognized by this Court.

B. Petitioners Fail to Demonstrate That Any of the Exceptions to the Fourth Amendment Requirements Were Present

1. S.G.'s seizure by law enforcement was not a special needs search and seizure conducted by school personnel acting alone to maintain school discipline and order.

Searches and seizures by school officials for the purpose of maintaining order and discipline in the schools fall within this Court's "special needs" exception to the Fourth Amendment. *T.L.O.*, 469 U.S. at 351; *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 829-30 (2002); *Vernonia*, 515 U.S. at 653. However, this Court's special needs jurisprudence does not wholly

insulate governmental searches and seizures on school property from Fourth Amendment requirements. The special needs exception does not create a Constitution-free zone once the school threshold is crossed.

At its core, the special needs exception aids school officials in their efforts to implement the legitimate state goal of preserving order to create a positive learning environment for students. It provides school officials with a "certain degree of flexibility *in school disciplinary procedures*" so that they can root out "conduct [that] is destructive of school order or of a proper educational environment." *T.L.O.*, 469 U.S. at 340 (emphasis added). Key to this exception is the Court's finding that the needs of teachers and administrators to uphold order and discipline justify relaxing the usual warrant requirement. *Vernonia*, 515 U.S. at 653 (citing *T.L.O.*, 469 U.S. at 340-41) (Rigid application of the warrant requirement "'would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed,' and 'strict adherence to the requirement that searches be based upon probable cause' would undercut 'the substantial need of teachers and administrators for freedom to maintain order in the schools.'")

The application of the special needs doctrine to searches by school officials is inextricably intertwined with "the broad authority of school administrators over *student behavior, school safety, and the learning environment*." *In re Randy G.*, 28 P.3d 239, 241 (Cal. 2001) (emphasis added). This authority to consider student safety and well-being is

what drives the relaxed Fourth Amendment requirements rather than where the search or seizure occurs. Here, where the seizure of nine year old S.G. by non-school personnel was divorced from any effort to uphold order and discipline at S.G.'s school, the applicable strictures of the Fourth Amendment cannot be ignored.

Jones v. Hunt, 410 F.3d 1221, 1228 (10th Cir. 2005), aptly articulates this critical distinction. As here, *Jones* involved the two hour seizure of a child by a social worker and deputy sheriff concerning a custody and domestic violence dispute; there were no allegations that the child violated school rules or engaged in wrongdoing. *Id.* The Tenth Circuit held that the lower court erred when it "concluded that the relaxed Fourth Amendment standard announced in *T.L.O.* should apply to this case" simply because the seizure of the child "took place on public school property." *Id.* "Because the case before us does not involve efforts by school administrators to preserve order on school property, it does not implicate the policy concerns addressed in *T.L.O.*," and therefore does "not merit application of the *T.L.O.* standard." *Id.* The Ninth Circuit properly applied the same analysis to this case.

2. The seizure and interrogation of S.G. was directly related to law enforcement purposes and thus does not qualify as a special needs search under this Court's jurisprudence.

The special needs exception also has been applied to certain searches and seizures where an important state-articulated need would otherwise be thwarted by application of traditional warrant/probable cause requirements. *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (A search unsupported by probable cause can be constitutional if it involves "special needs, beyond the normal need for law enforcement, [that] make the warrant and probable-cause requirement impracticable."). The governmental purpose must arise from a concrete issue or problem that is within the proper purview of the entity conducting the search. *Cf. Chandler*, 520 U.S. at 320 (mandatory drug testing of candidates running for state offices violated Fourth Amendment where there was no demonstration of drug abuse among elected officials or that "ordinary law enforcement methods would not suffice to apprehend such addicted individuals.") However, "extensive entanglement of law enforcement cannot be justified by reference to legitimate needs." *Ferguson v. City of Charleston*, 532 U.S 67, 84 n.20 (2001). Similarly, a "benign" motive cannot "justify a departure from Fourth Amendment protections, given the pervasive involvement of law enforcement" with a particular search or seizure. *Id.* at 85. Without these limiting parameters, most governmental functions and programs with important, legitimate goals could

routinely insulate themselves from Fourth Amendment requirements.

Moreover, "special needs" cases generally involve searches performed by state actors who are not law enforcement officials to further their agency's discrete goals and *not* for the purposes of detecting or investigating criminal activity. *See, e.g., Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 621 (1989) (drug testing of railroad employees constitutional as drug and alcohol use was related to increases in railway accidents and fatalities, and ensuring railway safety was important governmental interest); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989) (purposes of drug testing program "are to deter drug use among those eligible for promotion to sensitive positions within the [Customs] Service and to prevent the promotion of drug users to those positions. . . ."). The special needs exception has generally rested on either the lack of an association with law enforcement or restrictions on the use of the information obtained in the prosecution of a crime. *See Ferguson*, 532 U.S. at 79 (the "critical" marker of "a valid "special need" is that the objective is "divorced from the State's general interest in law enforcement.").

In the instant case, law enforcement played a central role in the seizure and questioning of S.G., and sought information in aid of prosecution of alleged criminal activity. As a consequence of the interrogation, S.G.'s father, already a suspect in the sexual abuse of another child, was rearrested and indicted for sexual assault of the other child and S.G. *Camreta*, 588 F.3d at 1016, 1018. In this key respect,

S.G.'s seizure is more analogous to the search in *Ferguson*, where the hospital's drug testing program for pregnant women, developed in concert with law enforcement officials, could result in criminal charges being filed against the women. *See Ferguson*, 532 U.S at 86 (drug testing scheme pervaded by a law enforcement purpose found to be unreasonable and not a special needs search). In contrast to the goals of the drug testing in *Earls*, *Von Raab*, and *Skinner*, "the central and indispensable feature of the [*Ferguson*] policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment," the threat of prosecution was "essential to the program's success, and "the immediate objective of the searches was to generate evidence for law enforcement purposes." *Id.* at 80, 82-83, 72.[5] Similarly, in the instant case, there was a direct law enforcement involvement and purpose in the seizure and interrogation of S.G., *Camreta*, 588 F.3d at 1027 n. 12, and a key objective of the state intrusion was to generate evidence to arrest and prosecute another individual.[6]

---

[5] The mere presence of a law enforcement official in searches and seizures related to child abuse investigations can be *per se* coercive. *See, e.g., Calabretta v. Floyd*, 189 F. 3d 808, 813 (9th Cir. 1999) (police officer who did not play an active role in interrogation of child abuse suspect was present at request of child welfare agency to intimidate suspect to open door and allow entrance into home when such action was not supported by probable cause or a warrant)

[6] Another key rationale for upholding certain special needs searches by non-law enforcement officers is their lack of familiarity with the legal requirements for warrants and probable cause. *See Skinner*, 489 U.S. at 623 ("Railroad supervisors, like school officials and hospital administrators are not in the business of investigating violations of the criminal laws or enforcing administrative codes, and otherwise have

While the investigation and prevention of child abuse is an important government responsibility, this legitimate state objective does not transform a seizure and interrogation of a nine year old child into a special needs case. As this Court has said, "the gravity of the threat alone cannot be dispositive of the questions concerning what means law enforcement officers may employ to pursue a given purpose." *Edmond*, 531 U.S. at 42. "Identifying the goal of protecting a child's welfare and removing him from an abusive home is easy; disentangling that goal from general law enforcement purposes is difficult." *Roe v. Tex. Dept. of Protective and Regulatory Servs.*, 299 F. 3d 395, 406-407 (5th Cir. 2002). Here the entanglement of law enforcement is pronounced; departure from the Fourth Amendment's warrant and probable cause requirements is not appropriate simply because it would make their job easier. The special needs exception cannot circumvent otherwise applicable mandates of the Fourth Amendment to law enforcement in the investigation of crimes. While any criminal investigation might be expedited by excusing fidelity to Fourth Amendment protections, where "ordinary law enforcement methods" would suffice to address the target problem, *see Chandler*, 520 U.S. at 320, even the most laudatory goal does not transform a search or seizure into a special needs

---

little occasion to become familiar with the intricacies of this Court's Fourth Amendment jurisprudence.") (citing *T.L.O.*, 469 U.S. at 339-40 and *O'Connor v. Ortega*, 480 U.S. 709, 722 (1987)(plurality opinion). Obviously, the law enforcement officer involved in S.G.'s interrogation had such knowledge and expertise.

search. Petitioners offer no credible reason as to why the law enforcement official here could not obtain a warrant, or indeed why law enforcement had to be involved in S.G.'s interrogation at all.

3. Law enforcement officials lacked consent to seize and interrogate nine year old S.G.

Obtaining voluntary consent is another exception to the traditional warrant requirement. *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973); *Florida v. Royer*, 460 U.S. 491, 497 (1983); *see also U.S. v. Mendenhall*, 446 U.S. 544, 557-58 (applying *Schneckloth*'s voluntary consent standard to seizures). School officials may not consent on behalf of school children to seizures by law enforcement or other state investigative agents. Therefore, any implied consent on the part of the school in this case -- by retrieving S.G. from her classroom and escorting her to a room where she would be interrogated by non-school officials – does not satisfy Fourth Amendment requirements. A Fourth Amendment right is personal and the totality of the facts and circumstances must be examined to determine if lawful consent was provided for a seizure. Here, there was no attempt to obtain a rights waiver from S.G. or her mother prior to her custodial interrogation involving an armed, uniformed sheriff.

a. Under the totality of the circumstances, no lawful, voluntary consent was provided for S.G.'s seizure and interrogation.

In the context of Fourth Amendment searches and seizures, "the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority." *Royer*, 460 U.S. at 497. A court must consider the totality of the circumstances to determine whether such a burden is satisfied. *Bustamonte*, 412 U.S. at 226; *Mendenhall*, 446 U.S. at 557. No valid, voluntary consent was given for S.G.'s seizure for an extended, traumatizing custodial interrogation. *Camreta*, 588 F.3d at 1030.

First, neither Petitioner made any attempt to seek express consent from S.G.'s mother, Sarah Greene, to allow for her seizure, removal from her classroom or questioning in a two-hour long interrogation session in the middle of her school day. *Greene v. Camreta* (*Greene I*), No. Civ. 05-6047-AA, 2006 WL 758547, at *1 (D. Or. March 23, 2006). Rather, the trial court expressly found that Camreta "did not seek or obtain parental consent for the interview." *Id.* Without ever contacting the Greenes, the state officials had a counselor at the elementary school remove S.G. from her class and place her in a small, unfamiliar office where Camreta and Sheriff Alford, who was armed and uniformed, questioned her at length in an effort to obtain incriminating information about her father. *Id.* Under the totality

of *these* circumstances, the Ninth Circuit was correct in its finding that no valid consent was given.

Although the Fourth Amendment right to privacy is generally personal, *see Alderman v. U.S.* , 394 U.S. 165, 174 (1968), since S.G. was only nine years old the Ninth Circuit correctly considered her mother's role in providing consent. When children are of such a "tender age," parental opinion on the question of a rights waiver is likely dispositive. *See, e.g., Dubbs v. Head Start,* 336 F.3d 1194 (10th Cir. 2003) (parental consent necessary under the Fourth Amendment for school official medical examination of pre-school age children); *Doe*, 327 F.3d at 499 (it is appropriate to look to the wishes of the parents for Fourth Amendment consent for elementary school age children); *Heck*, 299 F.3d at 407-08 (to conduct body cavity search of six year old girl, state "social worker must demonstrate probable cause and obtain a court order, obtain parental consent, or act under exigent circumstances").[7]

Moreover, while adult input into a child's decision to waive constitutional rights is generally seen as essential to voluntary, knowing, and intelligent choice, *see, e.g., Gallegos v. Colo.*, 370 U.S. 49, 53-54 (1962) (confession inadmissible where it

---

[7] Several factors may be evaluated in determining voluntariness of Fourth Amendment consent, including the person's youth and education and intelligence level, as well as whether the person was advised of their rights. *Bustamonte*, 412 U.S. at 226; *see also Mendenhall*, 446 U.S. at 557-58 (noting that the length of questioning, age, education level and gender may impact determinations of whether individual voluntarily consented to a seizure).

was obtained during five day period when 14-year-old detained child was not permitted to talk with his mother or an attorney), the record is also clear that neither Camreta nor Alford made any effort to obtain consent from S.G. S.G. was not told that she could refuse to participate in the interview, that she could confer with her mother, or that she had any rights at all. Instead, S.G. was physically ushered into a private office to talk with investigators. There she was repeatedly questioned behind closed doors by Camreta, who "[f]or over an hour, . . . kept asking [her] the same questions, just in different ways, trying to get [her] to change her answers." *Camreta*, 588 F.3d at 1017. The environment was so coercive that "[f]inally, [S.G.] just started saying yes to whatever he said," ultimately being released after the two hour ordeal. *Id.; see also Tarter v. Raybuck*, 742 F.2d 977 (6th Cir. 1984) (rejecting district court's finding that high school junior voluntarily consented to seizure and search at school because no indication child was ever made aware of his right to protest and "acquiesce[nce]...does not necessarily demonstrate the relinquishment of his rights"); *Hunt*, 410 F. 3d at 1226 (noting that circumstances needed to be viewed from the eyes of a reasonable 16-year old to determine if a seizure is consensual). Thus, even considering S.G.'s own interactions with the police investigative team and her "subjective understanding," no lawful, voluntary consent can be found in this case. *See Bustamonte*, 412 U.S. at 230.

b. School officials may not consent to a student's seizure and questioning by government officials conducting an investigation.

Schools have special duties and responsibilities for students in their care who have a lesser expectation of privacy within the institution's four walls. *Vernonia*, 515 U.S. 646 (1995). However, students are individuals who do not "shed their constitutional rights . . . at the schoolhouse gate." *Tinker v. DesMoines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Thus, this Court has carefully circumscribed the powers of school administrators over their students, prohibiting educators from taking actions inconsistent with their rights and those of their guardians. *See Washington v. Glucksberg*, 521 U.S. 702 (1997); *Santosky v. Kramer*, 455 U. S. 745, 753 (1982); *Wis. v. Yoder*, 406 U. S. 205, 232 (1972).

Given the conflicting roles held by school officials -- serving both as temporary caretakers for children as well as state agents -- this Court has rejected their ability to serve *in loco parentis* for Fourth Amendment purposes. *T.L.O.*, 469 U.S. 325, 336-37 (1985); *Vernonia*, 515 U.S. at 654-55; *Safford Unified Sch. Dist. 1 v. Redding*, 129 S. Ct. 2633, 2643 (2009) (majority implicitly declines to adopt Justice Thomas's call to return to the more robust common law understanding of *in loco parentis* for school officials by requiring that a search by a school official be reasonable at its inception and in its scope); *see also Picha v. Wielgos*, 410 F. Supp. 1214 (N.D. Ill.

1976) ("it is evident that the *in loco parentis* authority of a school official cannot transcend constitutional rights"). The Court has never allowed schools to make unilateral decisions on behalf of students and their families regarding private, non-educational matters, including consenting to law enforcement seizures and custodial interrogations.

This case provides no basis for altering this long-held view. Adopting such a rule would open the door to arbitrary abdication to third parties of important fundamental rights ordinarily held by students and their parents. *See Tenenbaum v. Williams*, 193 F.3d 581, 594 n.9 (2d Cir. 1999) (granting schools the same abilities as parents *vis a vis* students would permit them to consent to their own infringements on the students' rights); *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 481 n.18 (5th Cir. 1982) (rejecting broad *in loco parentis* powers of school administrators whose "duties . . . are not always exercised with only the child who is being disciplined or searched in mind"). School officials should not, therefore, be permitted to consent to police access to youth in their limited care. *Tenenbaum*, 193 F.3d at 594 n.9 ("The handing over of a child from a public school teacher to another State official, then, is not the equivalent of the consent of the parents."); *see also Dubbs*, 336 F. 3d at 1207 (noting that if school had obtained parental consent to search the pre-school children, there would be no Fourth Amendment violation).

In addition, voluntariness is the touchstone for consent in Fourth Amendment case law. *Schneckloth*, 412 U.S. at 222; *Mendenhall*, 446 U.S.

at 558; *see also Royer*, 460 U.S. at 497 ("the State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority"). The compulsory nature of our education system, therefore, further prohibits expansion of an *in loco parentis* rule that would allow school officials to consent to seizure of school children by outside agents. Children are required to attend school. *See Ingraham v. Wright*, 430 U.S. 651, 660 n.14 (1977) (noting that compulsory school attendance laws have been in force in all states since 1918). If they do not, they face the prospect of prosecution in our juvenile court system. *See* Dean Hill Rivkin, *Truancy Prosecutions and the Right [to] Education*, Duke Forum for L. & Soc. Change (forthcoming Spring 2011). Their movements within school are highly restricted. *See Bend-La Pine Sch. Dist. Policy on Student Conduct and Discipline* (Jan 8, 2007), *http://www.bend.k12.or.us/education/components/docmgr/default.php?sectiondetailid=747&fileitem=1149&catfilter=146&PHPSESSID=2a3ee96e596f0ddcdc3baadcbfb9cadc* (warning students that "disobedience" or "defiance" on school grounds may result in discipline). Their parents may face separate allegations for educational neglect. *See, e.g., In re Jamol F.*, 24 Misc. 3d 772 (N.Y. Fam. Ct. 2009). To ensure that voluntariness remains key under the Fourth Amendment, school officials may not unilaterally require that students forced to attend their schools must also meet with state investigators at the school's discretion. *See Horton*, 690 F.2d at 481 ("in a compulsory education system . . . the parent does not voluntarily yield his authority over

the child to the school, so the concept of delegated authority is of little use."). A rule to the contrary would gut decades of Fourth Amendment voluntariness jurisprudence. *Schneckloth, supra.*

4. No exigent circumstances justified S.G.'s seizure and interrogation.

The warrant and probable requirements may be waived in certain situations where exigent circumstances make it impracticable to obtain a warrant: "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." *Warden Md. Penitentiary v. Hayden*, 387 U.S. 294, 298-99 (1967). Petitioners have failed to present any facts to support their contention that obtaining a warrant would have caused injury to S.G. or any other person.

Exigent circumstances may exist in circumstances where there is probable cause to arrest and at least one of three conditions exist: (1) pursuit of a fleeing suspect ("hot pursuit" exception);[8] (2) the immediate risk of the destruction of evidence;[9]

---

[8] *See, e.g., Warden*, 387 U.S. at 298 (exigent circumstances justified warrantless entry into dwelling and search for suspect who was seen entering the dwelling minutes after a reported robbery); *U.S. v. Santana*, 427 U.S. 38, 42-43 (1976) (exigent circumstances when law enforcement was in pursuit of a fleeing felon).

[9] *Cupp v. Murphy*, 412 U.S. 291, 294-96 (1973) (exigent circumstances justified warrantless search of fingernails for skin, blood cells, and fabric because police had probable cause to arrest and feared destruction of evidence); *see also Schmerber v. Cal.*, 384 U.S. 757, 761-77 (1966) (exigent circumstances

and (3) where the safety of law enforcement or the public is immediately threatened.[10] As with all exceptions to the warrant requirement, these categories are narrow and exacting. No exigent circumstances justified the warrantless seizure and interrogation of S.G. S.G. was neither suspected of wrongdoing herself nor in flight and, therefore, no "hot pursuit" exception applied in this case. S.G.'s whereabouts were known to the child welfare agency and there was no indication that her parents were blocking access to S.G. Moreover, there was no imminent risk of destruction of evidence; indeed, S.G. was not even searched to preserve any physical evidence that might degrade with time. Finally, S.G.'s warrantless seizure was not necessitated by an imminent threat of harm to S.G. or law enforcement. S.G. was seized and interrogated *three days after* petitioners learned of her father's release from jail. Moreover, S.G. was not taken into custody following the interrogation and was in fact allowed to return home even when there was evidence that her father may be in contact with S.G. If there had been a fear of imminent danger, state officials would surely have acted differently.

---

justified warrantless seizure of blood sample to test alcohol level because police had probable cause to arrest and feared destruction of evidence by dissipation of alcohol in blood)

[10] *Mich. v. Tyler*, 436 U.S. 499 (1978)(exigent circumstances justified warrantless entry to home to fight and investigate a fire); *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006)(exigent circumstances existed to enter a home without a warrant where an occupant was at risk of imminent injury)

C. The Reasonableness Test Applied by this Court in *Illinois v. Lidster* Cannot Be Applied to The Targeted Two Hour Seizure of S.G.

Petitioners urge the Court to apply the reasonableness test in *Illinois v. Lidster*, 540 U.S. 419 (2004) to the instant seizure to evade their Fourth Amendment obligations. This analogy fails.

Lidster involved "a highway checkpoint where police stopped motorists to ask them for information about a recent hit-and-run accident." *Lidster*, 540 U.S. at 421. All cars traveling past the checkpoint were stopped "for 10 to 15 seconds" and asked if they had seen anything related to the traffic accident the prior week and handed a flyer, requesting help in identifying the driver of the car who killed the victim. *Id.* As a "brief...information seeking stop," not targeted at any particular individual, and seeking only "voluntary cooperation," the Court held that this type of checkpoint stop was not per se unconstitutional, and that weighing its reasonableness would sufficiently ensure compliance with the Fourth Amendment. *Id.* at 425-26.

Lidster follows the reasoning of *Terry v. Ohio*, 392 U.S. 1 (1968), where the Court held that very brief and limited intrusions by police officers trigger a reasonableness analysis rather than a strict probable cause or warrant requirement. *See also United States v. Place*, 462 U.S. 696, 708 (1983); *Dunaway v. New York*, 442 U.S. 200, 210 (1979) (*Terry* "defined a special category of Fourth Amendment *'seizures' so substantially less intrusive*

than arrests that the general rule requiring probable cause to make Fourth Amendment 'seizures' reasonable could be replaced by a balancing test.") (emphasis added). However, the *Terry* exception is narrow. "*Terry* and its progeny nevertheless created only limited exceptions to the general rule that seizures of the person require probable cause to arrest. Detentions may be 'investigative' yet violative of the Fourth Amendment absent probable cause." *Royer*, 460 U.S. at 499. In addition, "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop." *Id.* at 500. Because S.G.'s seizure and subsequent questioning lasted well beyond "a temporary stop," a warrant or probable cause for the seizure of S.G. was required.

Indeed, the seizure and questioning of S.G. bear none of the indicia of the brief information-gathering stop in *Lidster*, nor can it seriously be characterized as a "seizure so substantially less intrusive than arrest," *Dunaway*, 442 U.S. at 210, as seen in the *Terry* line of cases. While Camreta contends that S.G. was a potential witness rather than a crime suspect, this fact alone does not justify the application of *Lidster's* reasonableness test. Nothing in the text or interpretation of the Fourth Amendment suggests this narrowing principle. *See* 4 Wayne R. LaFave, Search & Seizure § 9.2 (4th ed. 2010). A closed door two hour questioning of a nine year old child by a social worker in the presence of a visibly armed law enforcement officer about the most private and intimate aspects of her family life can hardly be compared to a voluntary, 10-15 second checkpoint stop. This Court's Fourth Amendment

jurisprudence mandates that law enforcement have a warrant or probable cause to justify a seizure of such magnitude.

D. Even If The Court Categorizes The Seizure Of S.G. As A Special Needs Seizure Or A Limited Stop, The Seizure Was Neither Justified At Its Inception Nor Reasonable In Its Scope

Under either the special needs or investigatory stop exceptions to the Fourth Amendment warrant requirements, the Court must still consider whether the state action was reasonable, balancing the individual's privacy expectations against the government's interests. *Von Raab*, 489 U.S. at 665-666. As this Court has held, "[d]etermining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the ... action was justified at its inception,' second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'" *T.L.O.*, 469 U.S. at 341 (quoting *Terry*, 392 U.S. at 20). Applying this test, S.G.'s seizure was unreasonable.

In *T.L.O.*, where the special needs search exception was applied, the Court weighed whether the search properly balanced "the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place[.]" *Id.* at 340. The Court explained that "a search of a student by a teacher or other school official will be 'justified at its

inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." *Id.* at 341-42. In this case, there were no allegations that S.G. had engaged in any wrongdoing or broken any school rules.

Even if this Court characterizes S.G.'s seizure as an investigatory seizure of a witness or victim of a crime, it was no less unjustified. As this Court found in *Lidster*, the motorist stops were reasonable because they a) merely sought general information from possible witnesses to a crime (rather than targeting a suspect), b) were brief in time, and c) were minimally intrusive and unlikely to provoke anxiety. *Lidster*, 540 U.S. at 424-26. In contrast, S.G.'s seizure was an intrusion targeted solely at S.G. for purposes which included collecting evidence of criminal activity by S.G.'s father. At the outset, Petitioners knew that the seizure would entail an intimidating and likely traumatic questioning of a nine year old child who was herself not suspected of any wrongdoing. S.G.'s seizure was not reasonable at its inception.

Nor was S.G.'s seizure and interrogation reasonable in its scope.[11]

---

[11] As this Court noted in *Lidster*, the stops were a "brief wait in line -- a very few minutes at most. Contact with the police lasted only a few seconds." *Lidster*, 540 U.S. at 427. In contrast, S.G. was seized and questioned for two hours. While the Court has been reluctant to set a maximum time for a permissible stop, it is clear that a two hour seizure exceeds what is lawful. *See Place* 462 U.S. at 709-10 ("[A]lthough we decline to adopt any outside time limitation for a permissible

"[A] search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *T.L.O.*, 469 U.S. at 341-42. In *Lidster* the interaction between police and the motorists was an exceptionally brief stop entailing nothing more than "a request for information and the distribution of a flyer." *Lidster*, 540 U.S. at 428. Rather than lasting 10-15 seconds, S.G.'s seizure stretched to two hours and was conducted in such a way as to cause unnecessary anxiety to S.G. Confining S.G. in a closed room with only the social worker and an armed law enforcement officer for approximately two hours, with no parent or other supportive adult present, hardly compares to the voluntary motorist stop in *Lidster*. Also unlike the *Lidster* stops, S.G.s seizure and questioning was likely to, and did, "provoke anxiety [and prove] intrusive." *Lidster*, 540 U.S. at 425. It was not "minimally intrusive of the individual's Fourth Amendment interests..." and therefore cannot be justified on less than probable cause or a warrant. *Place*, 462 US. at 703.

Petitioners and their *Amici* also argue that in assessing the reasonableness of S.G.'s seizure, the Court must balance a child's right to be safe with a child's right to familial relationships. *See, e.g.*, Brief for Cal. State Ass'n of Counties at 23-25. While children surely have a right to be safe, there was no

---

Terry stop, we have never approved a seizure of the person for the prolonged 90-minute period involved here.")

urgent safety need here. Thus, any so-called safety concern is outweighed by other important interests at stake. Certainly, a child's right to be free from unfettered state intrusion into their daily lives is an equally if not more compelling value. In holding that a police officer's warrantless body inspection of a toddler who was a suspected abuse victim violated the Fourth Amendment, the Tenth Circuit pointed out that there are other important interests at stake in such seizures:

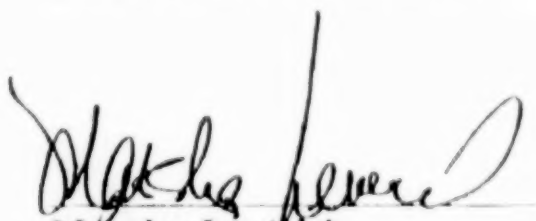
> [w]e must observe our judgment does not overlook or minimize the serious problems of child abuse and neglect and the emotionally charged arena in which they arise. Neither do we depreciate the defendant's expressed concern for the child nor doubt the sincerity of that concern. However, we must be sensitive to the fact that society's interest in the protection of children is, indeed, multifaceted, composed not only with concerns about the safety and welfare of children from the community's point of view, but also with the *child's psychological well-being, autonomy, and relationship to the family or caretaker setting*.

Franz v. Lytle, 997 F.2d 784, 792-93 (10th Cir. 1993) (citations omitted) (emphasis added). When viewed in light of *all* the interests that a child has, including his/her psychological well-being, autonomy, and family relations, in light of the specific facts of this case, S.G.'s seizure must be found unreasonable.

CONCLUSION

Law enforcement officials may not enter schools and, along with child protection workers, remove children from their classrooms for questioning without some outside check on that authority. The Fourth Amendment provides that check, proscribing such state action in the absence of a warrant or the establishment of one of the narrowly delineated exceptions to the warrant requirement. Because none of the exceptions to the strictures of the Fourth Amendment can be met here, *Amici* respectfully request that this Court affirm the Ninth Circuit's holding.

Respectfully submitted,



Marsha Levick*
**Counsel of Record*
Jennifer Pokempner
Lourdes Rosado
Juvenile Law Center
1315 Walnut St., Suite 400
Philadelphia, PA 19107
215-625-0551
mlevick@jlc.org

Mae C. Quinn
Civil Justice Clinic
Washington University in
St. Louis School of Law
One Brookings Drive
St. Louis, MO 63130
314-935-6088
mquinn@wulaw.wustl.edu

Dated: January 31, 2011

Appendix A

Table of Contents

Organizations A2

Center for Children's Advocacy A2

Center on Children and Families A2

Civil Justice Clinic A3

Education Law Center – PA A4

Juvenile Law Center A5

Juvenile Rights Project A6

National Juvenile Defender Center A7

Individuals A8

Tamar Birckhead A8

Kristin Henning A9

Barry Krisberg A10

Wallace Mlyniec A12

Appendix A

Collected Statements of Interest

Organizations

The Center for Children's Advocacy (CCA) is a non-profit organization based at the University of Connecticut Law School and is dedicated to the promotion and protection of the legal rights of poor children. The children represented by CCA are dependent on a variety of Connecticut state systems, including judicial, health, child welfare, mental health, education and juvenile justice. CCA engages in systemic advocacy focusing on important legal issues that affect a large number of children, helping to improve conditions for abused and neglected children in the state's welfare system as well as in the juvenile justice system. CCA works to ensure that children's voices are heard and that children are afforded legal protections everywhere – community, foster placements, educational institutions, justice system and child welfare.

The Center on Children and Families (CCF) at Fredric G. Levin College of Law is based at University of Florida, the state's flagship university. CCF's mission is to promote the highest quality teaching, research and advocacy for children and their families. CCF's directors and associate directors are experts in children's law, constitutional law, criminal law, family law, and juvenile justice, as

well as related areas such as psychology and psychiatry. CCF supports interdisciplinary research in areas of importance to children, youth and families, and promotes child-centered, evidence-based policies and practices in dependency and juvenile justice systems. Its faculty has many decades of experience in advocacy for children and youth in a variety of settings, including the Virgil Hawkins Civil Clinic and Gator TeamChild juvenile law clinic.

Mae C. Quinn is a Professor of Law at Washington University School of Law, where she co-directs its **Civil Justice Clinic (CJC)**. Upon joining the Washington University faculty in 2009, she helped establish the CJC's Youth and Family Advocacy Project. Through this new Project, students provide direct representation to youth and families in a variety of legal proceedings, focusing in particular on Juvenile Court matters in the St. Louis region. Approaching such work holistically, CJC's representation extends beyond the confines and conclusion of individual legal cases, extending to educational and other forms of advocacy, both for clients in the community and placed with Missouri's Division of Youth Services. Prior to teaching at Washington University, Professor Quinn was an Associate Professor at the University of Tennessee School of Law, where her classroom and clinical teaching focused on juvenile and criminal law. Former Chair of the Tennessee Association of

Criminal Defense Lawyers' Juvenile Justice Committee, Quinn helped build and share juvenile defense expertise across that state by planning trainings and serving on the faculty of its continuing legal education programs. Her prior experience also includes practicing for several years as New York City Public Defender and serving as an E. Barrett Prettyman Fellow with Georgetown University's Criminal Justice Clinic. On the international front, Quinn has traveled to Honduras as a Fulbright grant recipient teach clinical law faculty and students about United States juvenile and criminal defense advocacy practices. Holding an LL.M. from Georgetown University Law Center, a J.D. from the University of Texas School of Law, and a B.A. from SUNY-Albany, Quinn has written extensively about legal and ethical issues facing indigent defense counsel, criminal court and juvenile justice practices, and the problem-solving court movement.

The **Education Law Center - PA** is a public-interest organization dedicated to ensuring that all Pennsylvania children have access to a quality public education. Founded in 1975, ELC-PA focuses primarily on the needs of poor children, children in the child welfare or juvenile justice system, children with disabilities, English language learners, and others who are often at a disadvantage in the public education system. ELC-PA has worked to improve the quality of public education for Pennsylvania students through the provision of

advice, training, publications, technical assistance to attorneys and advocates, and representation of families in the courts and before administrative and legislative bodies. As advocates for students in the public school system, ELC-PA seeks to participate as amicus curiae in this case to prevent inappropriate custodial interrogations in schools in violation of the Fourth Amendment.

Juvenile Law Center, founded in 1975, is the oldest multi-issue public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Recognizing the critical developmental differences between youth and adults, Juvenile Law Center works to ensure that the child welfare, juvenile justice, and other public systems provide vulnerable children with the protection and services they need to become healthy and productive adults.

JLC employs multiple strategies on behalf of vulnerable children. We have represented children in child abuse and neglect proceedings in Philadelphia for the last 35 years. We routinely conduct trainings for child-serving professionals -- including but not limited to health care practitioners, social workers, case managers, family planning providers, juvenile justice staff and school-based professionals -- on the legal reporting requirements for child abuse and neglect in Pennsylvania. And our publication, *Child Abuse and the Law*, which is now

in its seventh edition, is the leading comprehensive manual on Pennsylvania abuse reporting requirements—it has been circulated to tens of thousands of child-serving professionals, attorneys, and judges since its first publication in 1977. Juvenile Law Center has been, is, and always will be committed to protecting children from all forms of abuse.

Juvenile Law Center participates as *amicus curiae* in state and federal courts throughout the country, including the United States Supreme Court, in cases addressing the rights and interests of children. Juvenile Law Center writes as *amicus curiae* in this case to urge the Court to continue to recognize the important constitutional guarantees that protect children's liberty interests, in particular when they come into contact with law enforcement officials as well as at all stages of juvenile court proceedings and in all proceedings affecting their liberty interests.

The **Juvenile Rights Project (JRP)** is Oregon's leading champion for children and youth in the courtroom and the community. JRP attorneys are appointed by the juvenile court to represent approximately 1,700 children per year in delinquency, dependency, and termination of parental rights cases at the trial and appellate level. In addition to court-appointed representation, JRP advocates for children in a variety of other ways. After identifying system-wide problems, JRP works with partners throughout Oregon to implement policy-level solutions. JRP provides information, individual class representation, administrative and

legislative advocacy, technical assistance and training throughout the state. JRP understands both the importance of a zealous advocate for children and youth and the importance of allowing children and youth access to the courts to cure state violations of their rights.

The **National Juvenile Defender Center** was created to ensure excellence in juvenile defense and promote justice for all children. The National Juvenile Defender Center responds to the critical need to build the capacity of the juvenile defense bar in order to improve access to counsel and quality of representation for children in the justice system. The National Juvenile Defender Center gives juvenile defense attorneys a more permanent capacity to address important practice and policy issues, improve advocacy skills, build partnerships, exchange information, and participate in the national debate over juvenile justice.

The National Juvenile Defender Center provides support to public defenders, appointed counsel, child advocates, law school clinical programs and non-profit law centers to ensure quality representation and justice for youth in urban, suburban, rural and tribal areas. The National Juvenile Defender Center also offers a wide range of integrated services to juvenile defenders and advocates, including training, technical assistance, advocacy, networking, collaboration, capacity building and coordination.

Individuals

Tamar Birckhead is an assistant professor of law at the University of North Carolina at Chapel Hill where she teaches the Juvenile Justice Clinic and the criminal lawyering process. Her research interests focus on issues related to juvenile justice policy and reform, criminal law and procedure, and indigent criminal defense. Licensed to practice in North Carolina, New York and Massachusetts, Professor Birckhead has been a frequent lecturer at continuing legal education programs across the United States as well as a faculty member at the Trial Advocacy Workshop at Harvard Law School. She is vice president of the board for the North Carolina Center on Actual Innocence and has been appointed to the executive council of the Juvenile Justice and Children's Rights Section of the North Carolina Bar Association. Professor Birckhead received her B.A. degree in English literature with honors from Yale University and her J.D. with honors from Harvard Law School, where she served as Recent Developments Editor of the Harvard Women's Law Journal. She regularly consults on matters within the scope of her scholarly expertise, including issues related to juvenile justice policy and reform, criminal law and procedure, indigent criminal defense, and clinical legal education. She is frequently asked to assist litigants, advocates, and scholars with amicus briefs, policy papers, and expert

testimony, as well as specific questions relating to juvenile court and delinquency.

Professor Kristin Henning joined the faculty of the Georgetown Law Center in 1995 as a Stuart-Stiller Fellow in the Criminal and Juvenile Justice Clinics. As a Fellow she represented adults and children in the D.C. Superior Court, while supervising law students in the Juvenile Justice Clinic. In 1997, Professor Henning joined the staff of the Public Defender Service (PDS) for the District of Columbia where she continued to represent clients and helped to organize a Juvenile Unit designed to meet the multi-disciplinary needs of children in the juvenile justice system. Professor Henning served as Lead Attorney for the Juvenile Unit from 1998 until she left the Public Defender Service to return to Georgetown in 2001. As lead attorney, she represented juveniles in serious cases, supervised and trained new PDS attorneys, and coordinated and conducted training for court-appointed attorneys representing juveniles.

Professor Henning has been active in local, regional and national juvenile justice reform, serving on the Board of the Mid-Atlantic Juvenile Defender Center, the D.C. Department of Youth Rehabilitation Services Advisory Board and Oversight Committee, and on local D.C. Superior Court committees such as the Delinquency Working Group and the Family Court Training Committee. She has published a

number of law review articles on the role of child's counsel, the role of parents in delinquency cases, confidentiality in juvenile courts, and therapeutic jurisprudence in the juvenile justice system. She is also a lead contributor to the *Juvenile Law and Practice* chapter of the District of Columbia Bar Practice Manual and has participated as an investigator in eight state assessments of the access to counsel and quality of representation for juveniles.

Kris Henning received her undergraduate degree from Duke University, a J.D. from Yale Law School in 1995, and an LL.M. degree from Georgetown University Law Center in 2002. In 2005, Kris was selected as a Fellow in the Emerging Leaders Program of the Duke University Terry Sanford Institute of Public Policy and the Graduate School of Business at the University of Cape Town, South Africa. Professor Henning also traveled to Liberia in 2006 and 2007 to aid the country in juvenile justice reform and was awarded the 2008 Shanara Gilbert Award by the Clinical Section of the Association of American Law Schools in May for her commitment to social justice, service to the cause of clinical legal education, and an interest in international clinical legal education.

Barry Krisberg is currently the Research and Policy Director of the Chief Justice Earl Warren Institute on Law and Social Policy at the University of California, Berkeley Law School. He is also a

Lecturer in Residence at in the Juris Doctor Program at Berkeley Law and was recently a Visiting Scholar at John Jay College in New York City.

He is known nationally for his research and expertise on juvenile justice issues and is often called upon as a resource for professionals, foundations, and the media.

Dr. Krisberg received his master's degree in criminology and a doctorate in sociology, both from the University of Pennsylvania.

Dr. Krisberg was appointed by the legislature to serve on the California Blue Ribbon Commission on Inmate Population Management. He has served on almost all major statewide task forces on CA corrections issues over the past 20 years. He is past president and fellow of the Western Society of Criminology and was the Chair of the California Attorney General's Research Advisory Committee.

In 1993 he was the recipient of the August Vollmer Award, the American Society of Criminology's most prestigious award. The Jessie Ball duPont Fund named him the 1999 Grantee of the Year for his outstanding commitment and expertise in the area of juvenile justice and delinquency prevention. In 2009, He received special recognition by the Annie E. Casey Foundation for his contributions to the Juvenile Detention Alternatives Initiative.

Dr. Krisberg was appointed to chair an Expert Panel to investigate the conditions in the California youth prisons. In 2004, he was named in a consent decree to help develop remedial plans and to monitor many of the mandated reforms in the California Division of Juvenile Justice. He has also assisted the Special Litigation Branch of the USDOJ on CRIPA investigations. He has been retained by the New York State Office of Children and Family Services to assist in juvenile justice reforms.

Wallace Mlyniec is the former Associate Dean of Clinical Education and Public Service Programs, and currently the Lupo-Ricci Professor of Clinical Legal Studies, and Director of the Juvenile Justice Clinic at Georgetown University Law Center. He teaches courses in family law and children's rights and assists with the training of criminal defense and juvenile defense fellows in the Prettyman Legal Internship Program. He is the author of numerous books and articles concerning criminal law and the law relating to children and families. Wallace Mlyniec received a Bicentennial Fellowship from the Swedish government of study their child welfare system, the Stuart Stiller Award for public service, and the William Pincus award for contributions to clinical education. He holds his B.S. from Northwestern University and his J.D. from Georgetown University. He is the Vice Chair of the Board of Directors of the National Juvenile Defender

Center and former chair of the American Bar Association Juvenile Justice Committee.

Nos. 09-1454, 09-1478

IN THE

Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

JAMES ALFORD,
Deschutes County Deputy Sheriff,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE LEGAL AID SOCIETY, JUVENILE RIGHTS PRACTICE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

STEVEN BANKS
Counsel of Record
TAMARA STECKLER
GARY SOLOMON
THE LEGAL AID SOCIETY
199 Water Street
New York, New York 10038
(212) 577-3551
sbanks@legal-aid.org

Counsel for Amicus Curiae

234433

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF CITED AUTHORITIES	iii
INTEREST OF THE *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	6
UNDER THE FOURTH AMENDMENT, CHILD PROTECTIVE AUTHORITIES SHOULD BE REQUIRED TO OBTAIN ADVANCE JUDICIAL APPROVAL OF SEARCHES AND SEIZURES OF CHILDREN WHENEVER IT IS PRACTICABLE TO DO SO	6
I. The Fourth Amendment Creates a Presumption in Favor of Judicial Review, Which, in this Context, Will Protect Children and Families from Inappropriate and Potentially Harmful Searches and Seizures By Child Protective Authorities, and Involves No Additional Risk of Harm	6
II. Federal Appeals Court Decisions Have Applied Probable Cause and Advance Judicial Review Requirements To Home Entries, Removals of Children for Placement in Foster Care, and Physical Examinations of Children by Child Protective Authorities	14

Table of Contents

Page

III. The Emergency and Exigent Circumstances Exceptions to the Judicial Authorization Requirement, and the Possibility of Obtaining Consent, Provide Child Protective Agencies With More Than Enough Authority to Protect Children From Imminent Harm... 19

IV. Investigative Activity by Child Protective Authorities Which Falls Short of a Removal for Placement in Foster Care, But Far Exceeds the Scope of a Limited Seizure, Should Require Advance Judicial Authorization Whenever It is Practicable..... 22

V. When the Child is Seized in a Manner Equivalent to a Limited "Terry Stop," Application of Terry's Reasonableness Standard is Appropriate, But Where, as Here, the Child is Seized Several Days After the Report of Abuse, Advance Judicial Authorization Should be Required 24

CONCLUSION 30

TABLE OF CITED AUTHORITIES

Page

SUPREME COURT CASES

Brigham City v. Stuart,
547 U.S. 398 (2006) 20

Hayes v. Florida,
470 U.S. 811 (1985) 22, 23

Illinois v. Lidster,
540 U.S. 419 (2004) 26

Indianapolis v. Edmonds,
531 U.S. 32 (2000) 26

Michigan v. Fisher,
_U.S._, 130 S. Ct. 546 (2009) 20

New Jersey v. T.L.O.,
469 U.S. 325 (1985) 6, 28, 29

Payton v. New York,
445 U.S. 573 (1980) 18

Pennsylvania Board of Probation and Parole v. Scott,
524 U.S. 357 (1998) 23

Terry v. Ohio,
392 U.S. 1 (1968) ..... *passim*

United States v. United States Dist. Ct.,
407 U.S. 297 (1972) 18

Page

United States v. Watson,
423 U.S. 411 (1976) 23

OTHER FEDERAL CASES

Brokaw v. Mercer County,
235 F.3d 1000 (7th Cir. 2000) 19

Calabretta v. Floyd,
189 F.3d 808 (9th Cir. 1999) 14

Darryl H. v. Coler,
801 F.2d 893 (7th Cir. 1986) 29

Doe v. Heck,
327 F.3d 492 (7th Cir. 2003) 25, 27, 29

Doe v. Kearney,
329 F.3d 1286 (11th Cir. 2003) 16, 19

Gates v. Texas Department of Protective and Regulatory Services,
537 F.3d 404 (5th Cir. 2008) 18

Gomes v. Wood,
451 F.3d 1122 (10th Cir. 2006) 16

Good v. Dauphin County Social Services for Children and Youth,
891 F.2d 1087 (3d Cir. 1989) 18

Greene v. Camreta,
588 F.3d 1011 (9th Cir. 2009) ..... *passim*

Cited Authorities

Page

Kenny A. v. Perdue,
2004 WL 5503780 (N.D.Ga. 2004) 12

LaShawn A. v. Kelly,
990 F.2d 1319 (D.C. Cir. 1993) 12

Marisol A. v. Giuliani,
126 F.3d 372 (2d Cir. 1997) 12

Nicholson v. Williams,
344 F.3d 154 (2d Cir. 2003) 10

People United For Children, Inc. v. City of New York,
214 F.R.D. 252 (S.D.N.Y. 2003), *reconsideration denied* 2003 WL 22056930 10

Roe v. Texas Department of Protective and Regulatory Services,
299 F.3d 395 (5th Cir. 2002) 18

Roska ex rel. v. Peterson,
328 F.3d 1230 (10th Cir. 2003) 19

Tenenbaum v. Williams,
193 F.3d 581 (2d Cir. 1999) ..... *passim*

Tierney v. Davidson,
133 F.3d 189 (2d Cir. 1998) 20

United States v. Antwine,
873 F.2d 1144 (8th Cir. 1989) 20

Page

Williams v. Pollard,
44 F.3d 433 (6th Cir. 1995) 26

STATE CASES

Nicholson v. Scoppetta,
3 N.Y.3d 357 (2004) 12, 13

STATE STATUTES

Sup. Ct. R. 37.6 1

U.S. Const., amend. IV ..... *passim*

U.S. Const., amend. XIV 23

N.Y. Fam. Ct. Act § 1022 7

N.Y. Fam. Ct. Act § 1024 ..... 7, 9

JOURNALS

Mark R. Brown, *Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process*, 65 OHIO ST. L. J. 913 (2004) 8, 24

Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413 (November, 2005) 4-5, 11

INTEREST OF THE *AMICUS CURIAE*[1]

The Legal Aid Society is the nation's oldest and largest provider of legal services to low income families and individuals, providing legal representation in more than 300,000 legal matters for clients each year. The Legal Aid Society's Juvenile Rights Practice provides comprehensive legal representation to children who appear before the New York City Family Courts in all five boroughs, in abuse, neglect, juvenile delinquency, and other proceedings affecting children's rights and welfare. Last year, our Juvenile Rights staff represented some 30,000 children. Our perspective comes from our daily contacts with children and their families, and also from our frequent interactions with the courts, social service providers, and State and City agencies. In addition to representing many thousands of children each year in trial and appellate courts, Legal Aid also pursues law reform litigation and initiatives on behalf of our clients.

We are deeply devoted to furthering the interests of children. Our experience teaches us that those interests are best served when the law attempts to strike a fair balance between the parents' right to raise their children as they see fit, the family's right to be together, the children's own Fourth Amendment right to be free from unreasonable searches and seizures, the State's interest in protecting children from harm at the hands

---

1. Pursuant to Sup. Ct. R. 37.6, *Amicus Curiae* certify that no counsel for a party to this action authored any part of this brief, nor did any party or counsel for a party, or any other person or entity, make a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties to this action have consented to the filing of this brief.

of their caretakers, and the children's own interest in being protected. We want child protective authorities to be able to function effectively in their investigations. We are troubled when we learn of child abuse that might have been prevented by faster and more effective intervention by a child protective agency. But we also know that child protective agencies sometimes overreact to sensational publicity regarding child abuse that occurred on their watch by sending overt or subtle signals to employees that they should "remove the children first and ask questions later" whenever there is a hint of danger however remote.

So we are fearful at both extremes: we fear too little agency action, and too much. Yet, while there is precious little the courts can do about a child protective agency's undue reluctance to seize children, there is much the courts can do about an agency's abuse of its authority to seize children without first seeking a court order. For that reason, we believe that there should be advance judicial review of any agency action that implicates Fourth Amendment rights, unless such review is impracticable or would unduly constrain the agency in its efforts to protect children from serious harm. We hope this Court will arrive at a decision in this case that will advance that goal.

SUMMARY OF ARGUMENT[2]

Investigations conducted by child protective authorities involve a broad range of activities, some of which do not implicate the liberty and privacy interests protected by the Fourth Amendment at all, some of which go just over the line, and some of which are highly intrusive and clearly threaten not only compelling liberty and privacy interests, but also children's physical and emotional well-being.

Child protective authorities, sometimes accompanied by law enforcement officers, enter homes without a court order or the occupants' consent to conduct investigative interviews regarding allegations of abuse or neglect, to conduct an intrusive physical examination of the children, and/or to remove children who, the agency already believes, require immediate protection. Like a warrantless entry by law enforcement officers who are investigating criminal activity, an intrusion into the sanctity of the home by child protective authorities implicates fundamental privacy interests protected by the Fourth Amendment.

When a child protective worker takes physical control of a child outside the home and places the child in foster care, the restraint on the child's liberty is, at the very least, the functional equivalent of an arrest. Some types of

---

2. Since the facts of this case already have been set forth by the parties and other *amici*, we have chosen not to offer the Court yet one more version. Relevant facts have been integrated as necessary into our brief. We have also chosen not to address the question of the reviewability of the Ninth Circuit's Fourth Amendment ruling. But while our brief is designed to assist the Court should it reach the Fourth Amendment issues, we agree with respondents that the Ninth Circuit's ruling is not reviewable.

physical interference with the child's freedom of movement - for instance, when a child protective caseworker compels the child to travel from one location to another - involve restraints that fall short of a seizure for placement in foster care, but still go well beyond what is typical in the context of a police officer's *Terry* stop.[3] Other types of physical interference resemble a *Terry* stop, while other activities - for instance, investigative questioning that involves little or no significant restraint on the child's freedom of movement - will not even activate Fourth Amendment protections. Needless to say, there can be no "one-size-fits-all" application of the Fourth Amendment in the child protective context. Different standards should govern different activities. In this case, there was, in fact, a seizure of S.G. at the school, and advance judicial authorization should have been sought beforehand. But, however the Court rules, what we want most of all is for the Court to ensure that any Fourth Amendment standards it announces while resolving the dispute in this one case make sense when the entire continuum of child protective interventions is contemplated.

It is equally important that the Court not fall prey to alarmist rhetoric proffered by petitioners and their *amici* supporters. We acknowledge the State's compelling interest in protecting children from abuse and neglect, and the children's interest in being protected, but "state officials cause real harm in their quest to protect children, including fear, humiliation, shame, and emotional devastation, not to mention the loss of the children's and sometimes also their families' Fourth Amendment rights and the fundamental interests these implicate." Coleman, *Storming the Castle to Save the Children: The Ironic Costs*

---

3. *Terry v. Ohio*, 392 U.S. 1 (1968).

of a Child Welfare Exception to the Fourth Amendment, 47 WM. & MARY L. REV. at 527.

Moreover, child protective workers and law enforcement officers sometimes exercise very poor judgment, whether because of an excess of zeal or because of incompetence. *See* Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 525 (November, 2005) ("Too many officials on the ground are undertrained in relevant respects. Moreover, experience shows that children and families cannot count on officials to exercise their discretion in objectively reasonable ways. In particular, [Child Protective Services] and the police often assume guilt at the outset, and thus approach the evidence gathering process with an eye toward proving that assumption").

Thus, whatever the truth may be with respect to reports of abuse or neglect that are based on false information,[4] the importance of judicial oversight, in those circumstances in which it is practicable, cannot be gainsaid.

---

4. In the *Brief of the States of Arizona, et al. as Amicus Curiae in Support of Petitioners*, it is suggested that the reported 61.3% of child maltreatment referrals that were determined to be "unsubstantiated" is not as alarming as it appears because an "unsubstantiated" determination merely indicates that child protective authorities were unable to amass sufficient evidence, not that the allegations were untrue. *Id.* at 11-12. But we wonder what message this is meant to send given that the percentage of false allegations, and thus the number of unnecessary child protective agency interventions - including seizures of children - still must be quite substantial.

ARGUMENT

UNDER THE FOURTH AMENDMENT, CHILD PROTECTIVE AUTHORITIES SHOULD BE REQUIRED TO OBTAIN ADVANCE JUDICIAL APPROVAL OF SEARCHES AND SEIZURES OF CHILDREN WHENEVER IT IS PRACTICABLE TO DO SO

I. The Fourth Amendment Creates a Presumption in Favor of Judicial Review, Which, in this Context, Will Protect Children and Families from Inappropriate and Potentially Harmful Searches and Seizures By Child Protective Authorities, and Involves No Additional Risk of Harm

The Fourth Amendment is applicable to the activities of civil as well as criminal authorities. Even school officials, who, unlike child protective authorities, have temporary physical custody with the consent of students' parents, are deemed to be exercising public rather than parental authority when they search students. *New Jersey v. T.L.O.*, 469 U.S. 325, 335-337 (1985). Thus, the starting point for any Fourth Amendment analysis of child protective investigations should be this presumption articulated in *Terry v. Ohio*, 392 U.S. 1 (1968): "We do not retreat from our holdings that police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure (citations omitted), or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances (citations omitted)." 392 U.S. at 20.

Removal from parental custody constitutes the ultimate governmental intrusion on the child's Fourth

Amendment rights. The child experiences a complete deprivation of personal liberty, and the wrenching loss of familial connections. The child is compelled to live away from his or her family, in a foster family home if he or she is lucky, or, if not so lucky, in a congregate care facility in which emotional support is difficult if not impossible to come by. Although an adult arrestee knows about the possibility of release with or without bail, a child might well fear that the removal is permanent, and that the family life he or she once took for granted, and perhaps those he or she loves, have been lost for all time. This exacerbates the risk of serious and lasting trauma, which, of course, is particularly vexing in those cases in which the removal is later found to have been unwarranted and is overturned by a judge.

Accordingly, the New York State Legislature recognized long ago that a fair balancing of families' constitutional right to remain together, and the State's interest in protecting children, justifies imposition of a requirement that the authorities seek a court order before removing a child when the resulting delay will not place the child at risk. New York Family Court Act § 1024, which authorizes emergency removal by child protective authorities and other specified officials without a court order, states that such a removal may take place if: "(i) such person has reasonable cause to believe that the child is in such circumstances or condition that his or her continuing in said place of residence or in the care and custody of the parent or person legally responsible for the child's care presents an imminent danger to the child's life or health; and (ii) *there is not time to apply for an order* under [N.Y. Fam. Ct. Act § 1022]" (emphasis supplied).

The safeguards and benefits provided by advance judicial review are obvious. Judges are far more likely to be faithful to the law governing removal and other searches or seizures than a well-intentioned but possibly skittish child protective worker. Judges lack an emotional or professional stake in the outcome, while child protective agencies often adopt "safety first" policies that encourage, or at least condone, employees' reliance on guesswork and hunches. Agencies also overreact and intervene too often and too aggressively in the wake of a highly-publicized child fatality that allegedly resulted from an agency's failure to intervene. Judges do have personal views about child safety issues, but, because of their assigned role and their training, are far more likely to steer a middle course no matter what the public mood seems to be or what political winds are blowing inside the child welfare agency.

Those of us who are familiar with the workings of the juvenile/family courts also know that once an agency has removed a child without a court order, the deck can become stacked in favor of continued removal. After the child already has experienced the trauma of separation, a judge might be more likely to order removal than the judge would be when making the decision in the first instance. Although a parent has a presumptive right to custody, a judge might be influenced by the fact that the children already are residing with foster parents who are believed to be capable and caring, or be swayed by a natural reluctance to uproot the children yet again before more information is obtained. *See* Mark R. Brown, *Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process*, 65 OHIO ST. L. J. 913, 928 (2004) (author notes that judges apply a higher standard when judging warrant applications before a search than

when deciding suppression motions after incriminating evidence has been found).

Child protective agencies are well aware that they can carry out their own changing and idiosyncratic policies regarding searches and seizures, and gain an advantage in litigation, when they act unilaterally rather than expose their decision-making to judicial review. New York City's child protective agency (now called the Administration for Children's Services, or "ACS") has a history of violating N.Y. Fam. Ct. Act § 1024 by removing children without attempting to obtain a court order in circumstances in which there was ample time to do so without placing the child at any risk of harm. The message from child protective agencies that operate in this way is unmistakable: we know best how to protect children, and because judicial review will only postpone the inevitable or else hinder our work, we will avoid it when we can and do what we believe is best for the children. This is not to say that the agencies do not have good intentions, but, like many other government agencies, they often prefer not to have their behavior scrutinized, or be inconvenienced.

This tendency to avoid judicial oversight whenever possible has not gone unnoticed by courts in New York. In *Tenenbaum v. Williams*, 193 F.3d 581 (2d Cir. 1999), the Second Circuit cited evidence that it was routine child protective agency practice to seek a removal order from a court only after removing the child. New York City specifically conceded that both "the removal of Sarah and her subsequent examination" were accomplished pursuant to City policy, and that concession was reconfirmed at oral argument in the Second Circuit. 193 F.3d at 591.

In *Nicholson v. Williams*, 344 F.3d 154 (2d Cir. 2003), plaintiffs alleged that there was a government custom or practice of removing children from the custody of a parent who had been battered by a spouse or paramour, based on the theory that the parent's failure to protect the child from witnessing the abuse was itself a form of child neglect. The district court found that, in many instances, removal took place, either with or without court order, where the only substantiated basis for finding neglect was that the custodial parent "allowed" the child to witness the custodial parent being abused by another adult. The district court also found that top policy-makers at the agency knew of the practices alleged, and responded by making only cosmetic changes in the agency's policy statements, which offered contradictory guidance or no guidance at all, and generally had taken only preliminary and insufficient steps to train the agency's staff to understand domestic violence issues. 193 F.3d at 163-164.

In *People United For Children, Inc. v. City of New York*, 214 F.R.D. 252 (S.D.N.Y. 2003), *reconsideration denied* 2003 WL 22056930, plaintiffs who were "African American or black" alleged that ACS failed to fully investigate allegations of child neglect and abuse against parents and legal guardians before removing children from their custody, and that there was a policy of resolving "[a]ny ambiguity regarding the safety of a child ... in favor of removing the child from harm's way" and returning children to their parents or guardians "[o]nly when families demonstrate to the satisfaction of ACS that their homes are safe and secure." 214 F.R.D. at 254-55.

Our staff still sees evidence of these practices. We often represent children who have been removed by the agency without a court order months after the

initial report of abuse or neglect was made, and in many instances the removal does not appear to have been fueled by new evidence of abuse or neglect. Sometimes removal is a child protective worker's reaction to the parents' lack of cooperation, and is designed to create a more powerful incentive for the parents to comply with the agency's efforts to provide rehabilitative services. Needless to say, the agency is later hard-pressed to explain why it allowed the children to remain at home for many months, and, all of a sudden, found there was an emergency that justified removing the children without first seeking court authorization.

Petitioners and their *amici* supporters highlight the State's compelling interest in protecting children and the fact that seizures by child protective agencies flow from a desire to protect the child, and also observe that the child has an independent right to be protected from harm.[5] We do not doubt that. But that is in no way relevant to the question of whether judicial review is practicable or desirable. Arrests of criminal suspects flow in part from a desire to protect the community from a potentially dangerous individual: that impulse is no less salutary than the desire to protect a child from an abuser, yet no one has ever cited it as reason for circumventing court review. *See* Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. at 475-476 ("Notably, courts that favor the Fourth Amendment's particularized warrant and probable cause requirements

---

5. *See, e.g., Brief of the California State Ass'n of Counties, and League of California Cities as Amicus Curiae in Support of Petitioners*, at 23-28; *Brief of the Cook County Public Guardians as Amicus Curiae in Support of Neither Party and Suggesting Reversal*, at 7.

reject the argument that state officials need unfettered discretion to conduct this class of investigations simply because they concern children. Instead, they equate child abuse with other violent crimes for which no exception exists to the Fourth Amendment's usual strictures; they find that the exigent circumstances exception is an adequate tool to protect children who the government legitimately perceives to be at risk").

Moreover, while child protective agencies' intent may be to protect children from abuse and neglect at home, often they provide substandard conditions as an alternative, and make inadequate efforts to reunite the family. In our practice, we see children who have been denied visitation with their parents that is sufficient to preserve familial ties, or been placed inappropriately in institutional settings when they should be in a foster family home, or been separated from their siblings and placed in different homes or congregate care facilities, or been deprived of adequate medical and mental health treatment and other essential services. The many lawsuits aimed at dysfunctional child welfare systems around the country attest to the failure of child protective authorities to provide quality care and services to children and their families, and, in many instances, to protect children from being abused and neglected *in foster care*.[6] So, when child

---

6. A number of these cases are cited in *Kenny A. v. Perdue*, 2004 WL 5503780 (N.D.Ga. 2004). In *LaShawn A. v. Kelly*, 990 F.2d 1319 (D.C. Cir. 1993), *aff'g* 762 F.Supp. 959 (D.D.C. 1991), scandalous problems in the District of Columbia's child welfare system were exposed. Problems in New York City's child welfare system were brought to light in *Marisol A. v. Giuliani*, 126 F.3d 372 (2d Cir. 1997), *aff'g* 929 F.Supp. 662 (S.D.N.Y. 1996). In *Nicholson v. Scoppetta*, 3 N.Y.3d 357 (2004), the New York State Court of

protective authorities pray for special treatment under the Fourth Amendment, they do not do so with clean hands. Their history of failing to protect children sounds the alarm for as much judicial oversight as is practicable.

In sum, requiring advance judicial authorization for child protective seizures whenever practicable is a "win-win" proposition. It will create no additional risk to children's safety, and will improve overall outcomes by protecting children and their families from the harm that flows from unnecessary and improper searches and seizures. *See Tenenbaum v. Williams*, 193 F.3d 581, 604 ("As we observed in discussing procedural due process, judicial authorization makes a fundamental contribution to the proper resolution of the tension among the interests of the child, the parents, and the State"). Law enforcement authorities investigate crimes, and confront public emergencies and dangers, that require a prompt and focused response, and yet those authorities have managed to function effectively under the Fourth Amendment's probable cause and warrant requirements. There is no reason why child protective authorities cannot do so as well. The agencies and their attorneys are fully familiar with the courts in which they practice and appear, and know how to obtain court orders when they need them.

Appeals held that the risks to the child resulting from removal itself must be factored into the agency's removal determination, and thus a court, when considering removal, must do more than identify the existence of a risk of serious harm. "Rather, a court must weigh, in the factual setting before it, whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal. It must balance that risk against the harm removal might bring, and it must determine factually which course is in the child's best interests." 3 N.Y.3d at 378.

II. Federal Appeals Court Decisions Have Applied Probable Cause and Advance Judicial Review Requirements To Home Entries, Removals of Children for Placement in Foster Care, and Physical Examinations of Children by Child Protective Authorities

When child protective authorities investigating allegations of abuse or neglect enter a family's home without consent and/or seize a child for the purpose of placing the child in foster care, or conduct an intrusive body search, Fourth Amendment probable cause and judicial authorization requirements should apply unless a person exercising reasonable judgment would conclude that the child will be exposed to the danger of abuse before court authorization can be obtained. If there is time to go to court, *there is no emergency*, and thus it is unreasonable to seize the child. Support for this view appears in federal appeals decisions, and we urge the Court to adopt the reasoning in those cases. While some of those decisions, like the Ninth Circuit's decision in this case, appear to have turned on the fact that there was police involvement,[7] we do not believe that the absence of police involvement should be a decisive factor since the need for judicial review is compelling no matter who is taking action. And, even if the Court does not apply probable cause and judicial review requirements, and chooses instead to apply a "reasonableness" standard, the Court should hold that it is not reasonable for a child protective agency to engage in these intrusive activities

7. The Ninth Circuit itself had previously applied traditional Fourth Amendment protections to a non-consensual home entry by a social worker and a police officer to interview and examine the children. *Calabretta v. Floyd*, 189 F.3d 808 (9th Cir. 1999).

without a court order when there is ample time to obtain an order without endangering the children.

The dangers created by child protective agency overreaching are nowhere more evident than in the Second Circuit's decision in *Tenenbaum v. Williams*, 193 F.3d 581. Five-year-old Sarah Tenenbaum was removed at about noon from her kindergarten class without a court order or parental consent and taken to the emergency room at Coney Island Hospital where a pediatrician and a gynecologist examined her for signs of possible sexual abuse. When no signs were found, Sarah was returned to her parents and the matter was abandoned by the authorities as an "unfounded" report of abuse. Sarah's parents brought suit against, *inter alia*, New York City and its child protective agency (then known as the Child Welfare Administration), and raised substantive and procedural Due Process and Fourth Amendment claims.

A Second Circuit majority, reversing an award of summary judgment in defendants' favor, found a triable issue of fact as to whether defendants' removal of Sarah from school was contrary to Sarah's right to be free from unreasonable seizures under the Fourth Amendment. In doing so, the court, while holding that it is appropriate to apply Fourth Amendment probable cause and warrant requirements to child protective authorities, concluded that "[i]f information possessed by [the child protective workers] warranted a person of reasonable caution in the belief that Sarah was subject to the danger of abuse if not removed from school before court authorization reasonably could be obtained, Sarah's removal complied with Fourth Amendment requirements despite the absence of a warrant equivalent because probable cause,

reasonable cause, *and* exigent circumstances sufficient to justify it existed." 193 F.3d at 605.[8]

Rejecting application of Fourth Amendment "special needs" analysis, the Second Circuit asserted that "if [child welfare] caseworkers have 'special needs,' we do not think that freedom from ever having to obtain a predeprivation court order is among them. Caseworkers can effectively protect children without being excused from '*whenever practicable,* obtain[ing] advance judicial approval of searches and seizures.' *Terry v. Ohio,* 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (emphasis added). As we observed in discussing procedural due process, judicial authorization makes a fundamental contribution to the proper resolution of the tension among the interests of the child, the parents, and the State. At the same time, it cannot be said that the requirement of obtaining the equivalent of a warrant where practicable imposes intolerable burdens on the government officer or the courts, would prevent such an officer from taking necessary action, or tend to render such action ineffective." 193 F.3d at 604.

---

8. The Eleventh Circuit prefers an exigent circumstances analysis that does not automatically turn on the feasibility of prompt court review and allows consideration of all the circumstances. *Doe v. Kearney,* 329 F.3d 1286, 1297-1298 (11th Cir. 2003). The Tenth Circuit agrees with the Eleventh Circuit that the presence or absence of sufficient time for judicial approval should not be "the single focus," because "[i]n many instances, it may not be entirely clear either how long it would take to obtain judicial approval or whether the period of delay would jeopardize the safety of the child," but has warned that if no consideration is given to the availability of judicial approval, "the definition of an emergency may be broadened to such an extent that due process rights are eroded. *Tenenbaum,* 193 F.3d at 584." *Gomes v. Wood,* 451 F.3d 1122, 1130-1131 (10th Cir. 2006).

The Second Circuit also held that even under special needs analysis, the same result was required: "If a more general 'special needs' 'reasonableness' test applies, we nonetheless see no basis upon which to depart from the probable cause standard here. If the information possessed by [the child welfare workers] would have warranted a person of reasonable caution in the belief that Sarah was subject to the danger of abuse if not removed from school before court authorization could reasonably have been obtained, her removal was reasonable also." 193 F.3d at 604.[9]

The Second Circuit also found that the physical examination of Sarah violated her Fourth Amendment rights, noting that there was no emergency because, at the time of the examination, Sarah "could not have been in danger from her father while she was being held by the [child protective agency]." 193 F.3d at 606.

Similarly, when addressing home entries made by child protective authorities, federal appeals courts have held that Fourth Amendment probable cause and judicial authorization requirements apply, at least when there is police involvement. This should come as no surprise given

---

9. The Second Circuit did not hold that special needs analysis will never be appropriate: "But we refrain from deciding categorically, as did the district court, that the removal of a child of whom abuse is suspected is not a 'special needs' situation. There may be circumstances in which the law of warrant and probable cause established in the criminal setting does not work effectively in the child removal or child examination context." 193 F.3d at 604. But the Second Circuit did not give the child welfare agency unfettered discretion to proceed without a warrant as petitioners and their supporters would have this Court permit.

that the Fourth Amendment is concerned most of all with protecting citizens from physical entry into the home. *Payton v. New York*, 445 U.S. 573, 585-586 (1980); *United States v. United States Dist. Ct.*, 407 U.S. 297, 313 (1972).

In *Good v. Dauphin County Social Services for Children and Youth*, 891 F.2d 1087 (3d Cir. 1989), the Third Circuit held that a caseworker and a police officer violated the Fourth Amendment when they entered plaintiffs' home and strip searched a child in the absence of consent, a valid search warrant, or exigent circumstances. The court noted that "[t]he Fourth Amendment caselaw has been developed in a myriad of situations involving very serious threats to individuals and society, and we find no suggestion there that the governing principles should vary depending on the court's assessment of the gravity of the societal risk involved. We find no indication that the principles developed in the emergency situation cases we have heretofore discussed will be ill suited for addressing cases like the one before us." 891 F.2d at 1094.

In *Gates v. Texas Department of Protective and Regulatory Services*, 537 F.3d 404 (5th Cir. 2008), the Fifth Circuit, noting that traditional Fourth Amendment standards regulate social workers' civil investigations, 537 F.3d at 419-420, held that social workers violated the Fourth Amendment when they made a warrantless entry into plaintiffs' home in the absence of consent or exigent circumstances. The court found no special needs in light of the involvement of law enforcement officers, who accompanied the social workers into the home. 537 F.3d at 424. The Fifth Circuit had reached a similar conclusion in *Roe v. Texas Department of Protective and Regulatory Services*, 299 F.3d 395 (5th Cir. 2002),

where child protective workers and the police entered and conducted a visual search of a child's body cavities without a warrant.

In *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230 (10th Cir. 2003), the Tenth Circuit held that there was no special need that rendered the Fourth Amendment's warrant requirement impracticable when social workers, accompanied by a police officer, entered a home to remove a child. 328 F.3d at 1242.

In *Doe v. Kearney*, 329 F.3d 1286 (11th Cir. 2003), the Eleventh Circuit held that a state official must obtain a court order prior to removing a suspected victim of child abuse from parental custody unless there is probable cause to believe the child is threatened with imminent harm. 329 F.3d at 1293-1294.[10]

III. The Emergency and Exigent Circumstances Exceptions to the Judicial Authorization Requirement, and the Possibility of Obtaining Consent, Provide Child Protective Agencies With More Than Enough Authority to Protect Children From Imminent Harm

When a child is at risk of being abused before a court order can be obtained, child protective agencies can rely

---

10. The Seventh Circuit has taken a somewhat different approach. In *Brokaw v. Mercer County*, 235 F.3d 1000 (7th Cir. 2000), the Seventh Circuit held that the removal of a child from his or her home is reasonable if it is: (1) done pursuant to a court order; (2) supported by probable cause; *or* (3) justified by exigent circumstances, meaning that state officers had reason to believe that life or limb was in immediate jeopardy. 235 F.3d at 1010.

on the emergency and exigent circumstances exceptions. With respect to home entries, the emergency exception is particularly suitable. Child protective officials "may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). All that is required is an objectively reasonable basis for believing that a person in the house is in need of immediate aid. *Michigan v. Fisher*, _U.S._, 130 S.Ct. 546, 548 (2009) (entry was reasonable where defendant's projectiles might have a human target, "perhaps a spouse or a child"). The exigent circumstances exception provides broad discretion in other circumstances. *See, e.g., Tierney v. Davidson*, 133 F.3d 189 (2d Cir. 1998) (search after officer discovered defendant was justified by concern that defendant or children were still in danger); *United States v. Antwine*, 873 F.2d 1144 (8th Cir. 1989) (entry justified after arrest of defendant where agent believed he needed to obtain weapon displayed by defendant prior to leaving children alone in home).

The exigent circumstances exception certainly could come into play during an investigation at a child's school. Say a thirteen-year-old child is interviewed at 9:00 a.m. and discloses that her father, her sole caretaker, has been sexually abusing her. She is scheduled to be discharged from school and picked up by her father at 2:30. That leaves more than five hours within which the agency can appear before a judge and seek a court order. But if the same child walks up to her teacher minutes before she will be picked up by her father and makes the same disclosure, getting a court order before the father takes the child home is impossible, and thus the agency may remove the child without a court order. Moreover, if, in the former scenario,

the agency found that because of court congestion it could not get in front of a judge before 2:30, removal without a court order might also be appropriate.

Undoubtedly, it is in the interests of petitioners and their *amici* supporters to downplay the prominent role of these exceptions in Fourth Amendment jurisprudence. They would rather have the Court be alarmed at the prospect of children being harmed while child protective authorities are seeking a court order. Yet, where a child protective agency has reasonably concluded that a child would be seriously harmed if allowed to return to or remain in the home, and there is not sufficient time to obtain a court order, who would second guess the decision to rely on an exception to the warrant requirement?

In many instances, child protective authorities are able to obtain voluntary consent from the parents or from the child. Again, petitioners and their supporters might prefer to downplay the utility of this option, but in our experience consent is provided routinely. The Ninth Circuit, as well as petitioner and their *amici* supporters, have focused on *parental* consent. Yet, because a child's own Fourth Amendment rights are at stake, we think the child's willingness, or refusal to consent will be a critical factor in certain contexts. Say, for instance that a seventeen-year-old child's parents refuse to consent to an examination of the child for signs of physical abuse, but the child, seeking protection from her abusive parents, is willing to submit to the examination. The child's consent should control. The same would be true if the parent consented to the examination, but the child refused. In contrast, we think the parent's consent should be effective when a three-year-old child is to be examined since a

child that age has no reasonable expectation of privacy that competes with parental prerogatives. In this case, what if S.G., upon leaving her classroom, had asked why she was being taken out of class, was informed that there were people there who wanted to talk to her about whether her father was hurting her, and promptly said she did not want to go and started back towards her classroom. Would anybody be arguing that she was not seized if she had been grabbed by the elbow and, while she tried to pull away, been forcibly taken to see Camreta and Alford? And if S.G. had expressed relief that, finally, someone had found out what was happening and was going to help her, would anybody be arguing that there was a seizure?

IV. Investigative Activity by Child Protective Authorities Which Falls Short of a Removal for Placement in Foster Care, But Far Exceeds the Scope of a Limited Seizure, Should Require Advance Judicial Authorization Whenever It is Practicable

Due to the length of time involved and the level of interference with a child's liberty, certain seizures that do not involve placement in foster care should activate probable cause and judicial authorization requirements. An example would be a case in which a child protective caseworker and a police officer, after being allowed to enter a family's home, compel the parents and the child to accompany them to the caseworker's office, or to a doctor's office or a hospital, for purposes of further investigation.

In *Hayes v. Florida*, 470 U.S. 811 (1985), the Court held that the Fourth Amendment was violated when a suspect was transported to the station house for fingerprinting,

without his consent and without probable cause or prior judicial authorization. The Court noted: "There is no doubt that at some point in the investigative process, police procedures can qualitatively and quantitatively be so intrusive with respect to a suspect's freedom of movement and privacy interests as to trigger the full protection of the Fourth and Fourteenth Amendments. . . . We adhere to the view that such seizures, at least where not under judicial supervision, are sufficiently like arrests to invoke the traditional rule that arrests may constitutionally be made only on probable cause." 470 U.S. at 815-16.

It is true that a criminal suspect may be arrested outside his or her home without a warrant. In *United States v. Watson*, 423 U.S. 411 (1976), the Court noted that "the judgment of the Nation and Congress has for so long been to authorize warrantless public arrests on probable cause rather than to encumber criminal prosecutions with endless litigation with respect to the existence of exigent circumstances, whether it was practicable to get a warrant, whether the suspect was about to flee, and the like." 423 U.S. at 423-424. But no such judgment has been made regarding seizures of children during child protective investigations, and there is no possibility of "endless litigation" in child protective court proceedings since evidence is not subject to suppression in such proceedings on Fourth Amendment grounds. *See Pennsylvania Board of Probation and Parole v. Scott*, 524 U.S. 357, 363 (1998) (court "ha[s] repeatedly declined to extend the exclusionary rule to proceedings other than criminal trials").

Moreover, while an at-large criminal suspect may do more harm and must be apprehended as soon as possible,

a child who has allegedly been victimized presents no danger. As well, a child protective worker's determination that a child is in imminent danger involves an intricate and potentially subjective and speculative analysis that differs dramatically from a police officer's fact-driven, dispassionate determination of probable cause. Thus, judicial review is far more important as a safeguard in the context of child protective investigations. As one author has put it: "For all these reasons, rescue is more of a gamble than might initially appear. While I am not aware of data that proves or disproves this proposition, it appears reasonable to believe that the likelihood of erroneous rescue is larger than the likelihood of erroneous arrest. The modern child welfare system lacks the indicia of reliability attached to criminal law enforcement. Unlike police forces, caseworker turnover is constant. Training is minimal and morale low. Caseworkers are routinely expected to apply vague standards to ambiguous facts. In light of the uncertainty that is naturally attached to these problems, one could easily conclude that greater procedural protections are needed. Post-deprivation review may suffice for arrest, but not for rescue and removal." Mark R. Brown, *Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process*, 65 OHIO ST. L. J. at 962.

V. When the Child is Seized in a Manner Equivalent to a Limited "Terry Stop," Application of Terry's Reasonableness Standard is Appropriate, But Where, as Here, the Child is Seized Several Days After the Report of Abuse, Advance Judicial Authorization Should be Required

Petitioners and their *amici* supporters suggest that the Ninth Circuit's ruling poses a threat to all questioning

of children during child protective investigations. Admittedly, if this Court were to rule that any incidental restriction on a child's freedom of movement during interviewing by child protective authorities always constitutes a seizure, *and* always activates probable cause and warrant requirements, we would have concerns as well.

Yet the Ninth Circuit did not come close to ruling that interviews of the type involved in this case always, or even frequently, constitute a seizure. Rather, the court was persuaded that there was a seizure in a case involving an interview that had certain coercive elements, including: (1) the fact that the school counselor told S.G. that someone was there to talk with her and took her to the room where Camreta and Alford were waiting; (2) Camreta's insistent questioning about "bad touches" in an attempt to get S.G. to change her answers; (3) the two-hour length of questioning; and (4) the presence of an armed police officer. On these facts, we do not think that ruling was unreasonable.[11] Indeed, support for the Ninth Circuit's ruling appears in *Doe v. Heck*, 327 F.3d 492 (7th Cir. 2003), which was cited by the Ninth Circuit (588 F.3d at 1022). In *Heck*, the Seventh Circuit found that a private school student was seized when he was escorted from class by the Principal, the caseworkers, and a uniformed police officer into the church's nursery, and then questioned, with the police officer present, for twenty minutes about intimate details of his family life, because no reasonable child would have believed that he was free to leave the

---

11. Petitioners do not directly challenge the Ninth Circuit's finding that a seizure occurred. Their *amici* supporters are divided into two camps: some, including the Solicitor General (*Brief for the United States as Amicus Curiae Supporting Petitioners*, at 21-22), assume *arguendo* that there was a seizure, while others directly challenge the Ninth Circuit's seizure finding.

nursery. Likewise, in *Williams v. Pollard*, 44 F.3d 433 (6th Cir. 1995), the Sixth Circuit found that there was a seizure when a social worker interviewed the child for more than two hours.[12]

It is true that this case involves a limited seizure, and not a full-blown removal of the child from the custody of the parents or an intrusion that far exceeded the scope of a typical seizure. Nevertheless, the Ninth Circuit properly applied traditional Fourth Amendment requirements. The Oregon Department of Human Services ("DHS") was informed that about a week earlier Nimrod Greene had been arrested on a charge that he had touched the penis of F.S., a seven-year-old boy, over his jeans when Nimrod was drunk in the home of F.S.'s parents. F.S.'s mother told the police that S.G.'s mother Sarah had complained about the way her husband Nimrod makes S.G. and her sister K.G. sleep in his bed when he is intoxicated, and that Sarah did not like the way Nimrod acts when S.G. and K.G. are sitting on his lap. F.S.'s father told the police that Nimrod

---

12. These seizures by child protective authorities bear no resemblance to the suspicionless, information-seeking highway stops approved in *Illinois v. Lidster*, 540 U.S. 419 (2004). Although S.G., like the motorists in *Lidster*, was potentially a witness to illegal conduct, in *Lidster* the Court relied on the fact that "[i]nformation-seeking highway stops are less likely to provoke anxiety or to prove intrusive" than the checkpoint stops in *Indianapolis v. Edmonds*, 531 U.S. 32 (2000) that were aimed at individuals involved in drug offenses; the fact that information-seeking stops "are likely brief"; and the fact that "citizens will often react positively" to being stopped. 540 U.S. at 425. In contrast, seizures of children by child protective workers are likely to provoke anxiety and/or prove intrusive, are not likely to be brief, and usually will not inspire a positive reaction.

himself had commented about accusations made by Sarah that he molested his daughters, and about the fact that Sarah did not like it when the girls lay in bed with him when he had been drinking. F.S.'s father informed the police that these types of comments and accusations had "come in several ways" from Nimrod and Sarah.

This was more than enough information - it included Sarah's admission that she had allowed inappropriate contacts between the girls and their father, and a possible admission by Nimrod - to support an application for a court order permitting DHS to seize S.G. for purposes of an interview. DHS had no need to develop additional facts in order to persuade a judge that there were sufficient grounds for the school seizure. Instead, DHS waited three days before going to S.G.'s school. This was not a dynamic, rapidly developing investigative process. This was a pre-planned seizure that could, and should, have been reviewed by a judge before it happened. Faced with ample time to seek a court order, the agency chose to act unilaterally.

In these circumstances, the Ninth Circuit's ruling makes complete sense. Indeed, the Ninth Circuit remained true to this Court's admonition in *Terry v. Ohio* that, whenever practicable, advance judicial approval of searches and seizures should be obtained. The Ninth Circuit's holding also finds support in *Doe v. Heck*, 327 F.3d 492, where the Seventh Circuit, after finding that the child was seized when he was escorted from a classroom into a church nursery and questioned with a police officer present, held that the seizure was presumptively unreasonable and could be upheld only if it fell within one of the few specifically established and well delineated

exceptions to the Fourth Amendment's warrant and probable cause requirements. 327 F.3d at 513.[13]

It is true that conducting an interview with S.G. rather than removing the children was a prudent thing to do, since the possibility existed that DHS would determine that S.G. and her sister had not been abused or that there was a safety plan that would suffice as protection. It is also true that seeking parental consent would have given the parents a "heads-up" and created a risk that they would interfere with the free flow of information from the children.[14] If DHS had merely conducted a non-coercive

---

13. For the reasons cited by the Ninth Circuit (*Camreta*, 588 F.3d at 1023-1025), and by the Second Circuit in *Tenenbaum* (193 F.3d at 607), the fact that S.G. was seized in school is not relevant. It is true that "requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." *New Jersey v. T.L.O.* 469 U.S. at 340. But when there is more than sufficient time to obtain a court order while the child remains safe, requiring child protective officials to apply for an order causes no inconvenience that justifies forgoing the ample benefits of judicial oversight. We reject any suggestion that merely because the child is not free to leave the school during school hours, the child is virtually fair game for anyone, including a child protective caseworker or a police officer, who wishes to seize the child on school grounds.

14. We agree with the Ninth Circuit (*Camreta*, 588 F.3d at 1030, n.18) and the Second Circuit (*Tenenbaum*, 193 F.3d at 594, n. 9) that school officials' consent to a seizure of a student is not effective for Fourth Amendment purposes. A child attends school to get an education. That is the expectation of the parents when they send their child to school, and that is the child's expectation. When school officials interfere with a child's freedom of movement within the school for the purpose of maintaining discipline and order, it does not upset the reasonable expectations of the child

interview of S.G., there would be no Fourth Amendment issue presented. And if DHS had gone to the school without the police immediately after the allegations came to light, and, as a result of information developed during non-coercive initial questioning, detained S.G. temporarily in a *Terry*-like dynamic encounter to determine whether it was safe for her to return home, we would be on petitioners' side, arguing that the reasonableness standard should apply and that DHS needed only reasonable suspicion that S.G. had been abused.[15]

---

or her parents. In contrast, when a child protective caseworker removes a child from a classroom learning environment and confines the child in a room and questions the child about abuse allegations that have absolutely nothing to do with school discipline and order, the child's freedom of movement has been restricted in a manner that bears no resemblance to what is expected or typical in the school setting. Although the Seventh Circuit takes a different view when public school (rather than private school) officials are involved [*compare Darryl H. v. Coler*, 801 F.2d 893, 902 (7th Cir. 1986) (where visual inspections of children were conducted by child protective workers in public school with consent of school officials, probable cause and warrant not required) *with Doe v. Heck*, 327 F.3d 492], we urge this Court not to do so and transform teachers into adjuncts of child welfare workers.

15. Both petitioner Alford (*Brief For Petitioner James Alford*, at 61), and the Solicitor General (*Brief for the United States as Amicus Curiae Supporting Petitioners*, at 7), have proposed a reasonable suspicion standard. This position finds support in cases upon which petitioners rely, such as *Terry v. Ohio* and *New Jersey v. T.L.O.* Others have pointed out that "[d]emonstrating that probable cause exists is particularly difficult in child abuse situations because often only the abuser and the victim know about the offense." *Brief of the States of Arizona, et al. as Amicus Curiae in Support of Petitioners*, at 30. But because this argument, taken to its logical conclusion, would justify rejection of even a reasonable suspicion requirement, and leave child protective authorities free to act based on rumor and conjecture, the argument must fail. The

But all that has nothing to do with the question of whether DHS, sufficiently sanguine about S.G.'s safety to let three days go by without speaking to her, should have obtained a court order before conducting a pre-planned Fourth Amendment seizure with the assistance of an armed police officer.

CONCLUSION

We know full well the importance of a prompt, thorough, and probing investigation of allegations of abuse or neglect. At the same time, we know that the child welfare system is deeply flawed. Child protective agencies, protective of their prerogatives and resistant to judicial oversight, do not have the kind of track record that justifies awarding them special treatment under the Fourth Amendment.

If the Court wishes to find a weather vane to point it in the right direction, it need look no further than the Federal trial and appellate courts. Those are the courts in which child welfare authorities have been sued by families that have been victimized by unnecessary and arbitrary agency intervention, and by foster care systems in which children languish for years without finding permanency, receive inadequate medical and mental health treatment and educational services, and are physically and emotionally abused. Those are the courts that know well the child welfare system's worst flaws, and the response from those courts has been to require judicial review, whenever it is practicable, *before* a child is seized.

---

need to develop evidence via an interview with the child cannot, by itself, justify a seizure, much less a removal for placement in foster care.

We do not doubt the good faith of child welfare authorities. But under Fourth Amendment analysis, "special needs" arise not from noble motives, but from the need to take action unfettered by probable cause and warrant requirements. There is a special need to seize a child without a warrant when an informal interview suddenly yields information about abuse and the child would be in danger if she were allowed to go on her way. But there is no special need when there is ample time to get a court order authorizing a home entry, or the removal of a child for placement in foster care, or a physical examination for signs of sexual abuse, without exposing the child to danger. And, in this case, there was no special need when S.G. was seized three days after abuse allegations came to the attention of child protective authorities.

Accordingly, we urge the Court to find that the seizure of S.G. violated the Fourth Amendment and affirm the decision below.

Respectfully submitted,

STEVEN BANKS
Counsel of Record
TAMARA STECKLER
GARY SOLOMON
THE LEGAL AID SOCIETY
199 Water Street
New York, New York 10038
(212) 577-3551
sbanks@legal-aid.org

Counsel for Amicus Curiae

Nos. 09-1454, 09-1478

IN THE

Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

JAMES ALFORD,
Deschutes County Deputy Sheriff,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR LEGAL SERVICES FOR CHILDREN AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

JOHN A. BASINGER
Counsel of Record
MICHAEL ATKINS
IRENE V. GUTIERREZ
SAHANG-HEE HAHN
ANGELA C. VIGIL
BAKER & MCKENZIE LLP
1114 Avenue of the Americas
New York, NY 10036
(212) 626-4463
john.basinger@bakermckenzie.com

Counsel for Amicus Curiae

234517

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF CITED AUTHORITIES iii

STATEMENT OF INTEREST 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

CERTIORARI WAS IMPROVIDENTLY GRANTED AND THE WRIT OF CERTIORARI SHOULD BE DISMISSED ... 5

I. Petitioners and Amici writing in support of Petitioners seek advisory opinions and present no justiciable case or controversy under Article III 6

A. Petitioners Seek an Advisory Opinion Relating to Future Hypothetical Seizures 7

B. Non-Parties Deschutes County and the State of Oregon, Writing for Petitioners Alford and Camreta, Respectively, Seek an Advisory Opinion 12

C. Petitioners and Amici Seek Advisory Opinions Concerning Questions Not Presented by the Parties 13

Table of Contents

Page

1. The Decision Under Review Is Narrower Than Represented by Petitioners and Amici Writing in Support of Petitioners 13

2. Amici and Petitioners read the question presented as being much more broad than the question this Court accepted, or ignore it altogether 15

II. Petitioners lack standing to bring the present appeal because they have not shown that they were personally injured by the circuit court's holding or that Supreme Court review will redress any injury 22

III. The case should be dismissed as moot 30

A. Petitioners and Respondent Lack a Personal Stake in the Appeal 30

B. The Oregon Laws Relied Upon By the Ninth Circuit and Petitioners Have Been Revised 33

IV. The Court Should Dismiss the Petition as Improvidently Granted for Prudential Reasons 34

CONCLUSION 36

TABLE OF CITED AUTHORITIES

Page

CASES

Aetna Life Ins. Co. v. Haworth,
300 U.S. 227 (1937) 12

Alvarez v. Smith,
130 S. Ct. 576 (2009) 13, 32

Arizonans for Official English v. Ariz.,
520 U.S. 43 (1997) 22, 31

Bender v. Williamsport Area School Dist.,
475 U.S. 534 (1986) 4, 10, 22, 23

Black v. Cutter Laboratories,
351 U.S. 292 (1956) 26

Bunting v. Mellen,
541 U.S. 1019 (2004) ..... *passim*

California v. Rooney,
483 U.S. 307 (1987) 25, 26, 27, 31

Capital Cities Cable, Inc. v. Crisp.,
467 U.S. 691 (1984) 21

County of Los Angeles v. Davis,
440 U.S. 625 (1979) 31

Darryl H. v. Coler,
801 F.2d 893 (7th Cir. 1986) 34, 35

Cited Authorities

Page

Deposit Guaranty National Bank v. Roper,
445 U.S. 326 (1980) 29, 30

Dixon v. Wallowa County,
336 F.3d 1013 (9th Cir. 2003) 23

Doe v. Bagan,
41 F.3d 571 (10th Cir. 1994) 34, 35

Electrical Fittings Corp. v. Thomas & Betts Co.,
307 U.S. 241 (1939) 29, 30

Flast v. Cohen,
392 U.S. 83 (1968) 6, 13, 19

Gates v.
Texas Dep't of Protective & Regulatory Servs.,
537 F.3d 404 (5th Cir. 2008) 34, 35

Greene v. Camreta,
2006 U.S. Dist. LEXIS 16764
(D. Or. Mar. 23, 2006) 7, 25

Greene v. Camreta,
588 F.3d 1011 (9th Cir. 2009), *cert. granted*,
2010 U.S. LEXIS 8024 ..... *passim*

In re Gault,
387 U.S. 1 (1967) 3

Cited Authorities

Page

In re Winship,
397 U.S. 358 (1970) 3

Iowa Beef Packers, Inc. v. Thompson,
405 U.S. 228 (1972) 31

Lewis v. Continental Bank Corp.,
494 U.S. 472 (1990) 30, 31, 32

Mathias v. Worldcom Technologies, Inc.,
535 U.S. 682 (2002) 6

McKeiver v. Pennsylvania,
403 U.S. 528 (1971) 3

Mitchell v. Forsyth,
472 U.S. 511 (1985) 23

Montana v. Imlay,
506 U.S. 5 (1992) 31

New Jersey v. T.L.O.,
469 U.S. 325 (1985) 8

North Carolina v. Rice,
404 U.S. 244 (1971) 20

Pearson v. Callahan,
129 S. Ct. 808 (2009) ..... *passim*

Cited Authorities

Page

Roe v.
Tex. Dep't of Protective & Regulatory Servs.,
299 F.3d 395 (5th Cir. 2002) 8

Saucier v. Katz,
533 U.S. 194 (2001) 24, 27, 28

Schall v. Martin,
467 U.S. 253 (1984) 3

Singleton v. Commissioner,
439 U.S. 940 (1978) 35

Spencer v. Kemna,
523 U.S. 1 (1998) 6, 32

Taylor v. McElroy,
360 U.S. 709 (1959) 31

Teague v. Lane,
489 U.S. 288 (1989) 21

Tenenbaum v. Williams,
193 F.3d 581 (2d Cir. 1999) 34

Terry v. Ohio,
392 U.S. 1 (1968) 7, 8, 11

United States v. Fruehauf,
365 U.S. 146 (1961) 12-13

Cited Authorities

Page

United States v. Montoya de Hernandez, 473 U.S. 531 (1985) 11

STATUTES

U.S. Const., amend IV ..... *passim*

U.S. Const., art. III ..... *passim*

Sup. Ct. R. 10(a) 36

Sup. Ct. R. 37.6 1

42 U.S.C. § 1983 ..... 5, 31

Fed. R. Civ. P. 58(a) 30

Or. Rev. Stat. § 418.747 34

C. Wright, Federal Courts 34 (1963) 19

STATEMENT OF INTEREST[1]

The mission of Legal Services for Children ("LSC") is to ensure that all children and youth have an opportunity to be raised in a safe environment with equal access to a meaningful education and the services and support they need to become healthy and productive young adults. This mission is rooted in the belief that young people need strong families and deserve positive alternatives to unnecessary placement in foster care, juvenile justice facilities, and immigration detention. Founded in 1975, LSC provides free legal and social work services to children and youth in the San Francisco Bay Area. LSC represents children and youth in guardianship, dependency, school discipline, immigration, emancipation, and restraining order proceedings.

As a law firm that regularly represents abused and neglected children in child protective proceedings, LSC understands the necessity for, and regularly interacts with, government agencies charged with protecting children who cannot safely remain with their families. To further the goal of protecting the safety and well-being of children, LSC supports the use of investigation techniques narrowly tailored to prevent unnecessary trauma, while eliciting reliable information.

---

1. Pursuant to Supreme Court Rule 37.6, counsel for amicus represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than amicus or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The Court's docket confirms that counsel for the parties have executed blanket consents to the filing of amicus briefs.

LSC also regularly represents children in school discipline, special education, and related education matters. To further the goal of ensuring that all children have the opportunity to receive a meaningful education, LSC advocates for fundamentally fair proceedings in which due process is upheld. Given the serious consequences that attend exclusion from school and the poor outcomes for young people who are excluded from school, LSC advocates against efforts to dilute the right of students to be free from unreasonable searches and seizures.

LSC believes that it is unnecessary to dilute the rights of one group of children in order to protect another. Public systems designed to protect children and aid efforts to stop child abuse are not compromised by the application of Fourth Amendment protections in the school setting. Most significantly, LSC seeks careful decision-making from courts at all levels in cases such as the one at bar which could have profound implications in many areas of children's law.

SUMMARY OF THE ARGUMENT

Certiorari was improvidently granted, and the petitions for writ of certiorari filed by Bob Camreta ("Camreta") and Deschutes County Deputy Sheriff James Alford ("Alford") should be dismissed.

Protection of children, particularly in the context of constitutional decision-making, deserves careful consideration in reference to the facts at issue to avoid unintended consequences. Since this Court began to articulate the rights of children in decisions in different areas of law over 30 years ago, this Court has recognized

the rights of children in several legal settings. *See, e.g., In re Gault*, 387 U.S. 1, 14-15 (1967); *McKeiver v. Pennsylvania*, 403 U.S. 528, 545-47 (1971); *In re Winship*, 397 U.S. 358 (1970); *Schall v. Martin*, 467 U.S. 253, 263 (1984). The developing body of law respecting children's rights has been careful to recognize the special needs of children, but never at the expense of their humanity and the rights that accompany that humanity in the United States. This Court protects them, but as rights-bearing individuals. This case represents another critical juncture in the development of law affecting children's rights. If the Court proceeds to rule in this case, its decision will reverberate in several areas of law including juvenile justice, child protection, Fourth Amendment, education law, the role of law enforcement in relation to youth in schools, the role of educators in relation to law enforcement investigations of school and non-school related events, and more. This Court must not weigh in where unintended consequences will result for children, in an unknowable variety of settings. The circumstances that bring this matter before this Court fail to present a live factual scenario because there is no harmed party for whom this Court's decision would change any outcome. This Petition seeks an advisory opinion because there is also no split among circuits about how to resolve the question discussed and decided by the Ninth Circuit. Where there is no live controversy, this Court is relegated to the legislative role of determining policy. Where this Court becomes a creator and implementer of policy, it becomes a target for several entities with policy agendas. In other words, it encourages amicus briefs urging the court to ignore the factual scenario in front of it and make broad brush policy strokes that those organizations want to see put in place. As this Court has long recognized:

> The requirement of actual injury redressable by the court . . . serves several of the implicit policies embodied in Article III. It tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action. The standing requirement serves other purposes. Because it assures an actual factual setting in which the litigant asserts a claim of injury in fact, a court may decide the case with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court.

Bender v. Williamsport Area School Dist., 475 U.S. 534, 542-43 (1986) (citations and quotation marks omitted). This case highlights the risk of attempting to address important issues of constitutional law absent the crucible of well-developed facts and truly contested, determinative issues of law. Indeed, the breadth and scope of positions taken by several Amici in this case bear that out where they are improperly seeking to amend the question presented to this Court.

Amicus briefs filed at the time of Petitioners' briefs seek the blessing of this Court for actions that this Court cannot properly consider in light of the path that this case has taken to this highest Court, and the circuit court's clear and correct rulings on qualified immunity for the state actors involved. It is not merely because amicus briefs have attempted to enlarge the question before this

Court that should cause this case to be dismissed. Rather, LSC contends that there is no legal basis to hear this case because it is moot, Petitioners have no standing and only an advisory opinion is being sought. It is the content of the Amicus briefs filed concurrently with Petitioners' that illustrate the imprecision of the record and therefore the questions in this case, and that has inspired them to attempt to mold an unclear proposition into many different questions not properly before this Court. A properly preserved and presented set of facts in a future case is the only vehicle that would allow this self-disciplined Court to review any actual residual Fourth Amendment questions when the facts of a case warrant such review and a split of circuits makes such review critical.

ARGUMENT

CERTIORARI WAS IMPROVIDENTLY GRANTED AND THE WRIT OF CERTIORARI SHOULD BE DISMISSED

Petitioners present no question that will alter the outcome of this matter for any party involved. The court of appeals affirmed the decision of the district court granting summary judgment in their favor on Respondent's § 1983 claim. Petitioners seek nothing more than an advisory opinion from this Court concerning the constitutional constraints upon law enforcement when law enforcement seeks to seize a child and conduct an in-school interrogation regarding events that are not school-related.

I. Petitioners and Amici writing in support of Petitioners seek advisory opinions and present no justiciable case or controversy under Article III.

Petitioners and the Amici writing in support of Petitioners fail to present a justiciable case or controversy. The "case or controversy" language of Article III of the U.S. Constitution limits the jurisdiction of federal courts to "questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). There is no justiciable case or controversy where, as here, a petitioner seeks an advisory opinion, when the question presented has been mooted, or when there is no standing to maintain an action. *Id.* at 95.

Petitioners who prevail in the action below may not appeal from a favorable judgment simply to seek review of findings that are "uncongenial" or that they "deem[] erroneous." *Mathias v. Worldcom Technologies, Inc.*, 535 U.S. 682, 684 (2002).

The substantive question on which Petitioners seek review is whether the traditional Fourth Amendment warrant/warrant exception analysis applies to the facts of the case, or whether the appropriate test is the reasonableness standard used when a witness is "temporarily detained," which balances an individual's privacy rights against the state's interests. Camreta Petition for Certiorari at i. *See also* Alford Petition for Certiorari at i. This claim is not justiciable and should be dismissed. *See Spencer v. Kemna*, 523 U.S. 1, 18 (1998).

A. Petitioners Seek an Advisory Opinion Relating to Future Hypothetical Seizures.

Neither Petitioners nor Respondent have a direct, personal stake in the outcome of this appeal – Respondent did not appeal the court of appeals' holding that Petitioners are entitled to qualified immunity, which ended the underlying claims against Petitioners, and Petitioners will not be personally affected by the outcome of the questions on appeal. In the absence of an issue for which effective relief can be granted, Petitioners highlight in their briefs future, potential seizures and seek an advisory opinion in violation of Article III.

Sarah Greene, on behalf of herself, and her minor children, S.G. and K.G. (collectively, "Respondent"), sued Petitioners Camreta and Alford, along with Alford's employer Deschutes County and others after they seized the nine-year-old girl in a school and questioned her for two hours about whether she had been sexually abused by her father. *Greene v. Camreta*, 588 F.3d 1011, 1020 (9th Cir. 2009). Respondent argued that Camreta and Alford violated S.G.'s right to be free from unreasonable seizure under the Fourth Amendment. *Greene v. Camreta*, 2006 U.S. Dist. LEXIS 16764, *1 (D. Or. Mar. 23, 2006). Petitioners moved for summary judgment. *Id.* at * 2.

The district court found the removal of S.G. from the classroom was a seizure of reasonable length in light of the facts and circumstances. *See id.* at * 7-11. The district court applied the standard set forth in *Terry v. Ohio*, 392 U.S. 1 (1968), that this seizure was reasonable because it was "justified at its inception," and the seizure of S.G. was "reasonably related in scope to the circumstances

which justified the interference in the first place." *Terry*, 392 U.S. at 20. The district court also held that the Petitioners were entitled to qualified immunity because reasonable officials could believe their actions were within constitutional bounds. *Id.* at * 11-13. The district court granted Petitioners' motions for summary judgment on the Fourth Amendment allegation. *Id.* at * 25. Respondent appealed.

On appeal, Petitioners did not contest the district court's ruling that the two-hour interview of S.G. was a seizure. *Greene*, 588 F.3d at 1022. Rather, the court of appeals considered whether "the warrantless, in-school interview of S.G. violated S.G.'s Fourth Amendment rights" in light of that concession. *Id.*

The Ninth Circuit reviewed and rejected application of the balancing of interests test from *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), citing the distinction between the searches and seizures conducted by school officials in *T.L.O.* and its progeny, and the seizure of S.G. by a state social services worker and a deputy sheriff. *Greene*, 588 F.3d at 1023-25. The court of appeals then considered the applicability of the "special needs" doctrine. *Id.* at 1025-31. The court of appeals looked precisely at Oregon law to determine that a child protective services investigation under that law is "'so intimately intertwined with law enforcement' as to render the 'special needs' doctrine inapplicable." *Id.* at 1028 (quoting *Roe v. Tex. Dep't of Protective & Regulatory Servs.*, 299 F.3d 395, 407 (5th Cir. 2002)). The court of appeals applied the "traditional Fourth Amendment requirements" and found "the decision to seize and interrogate S.G. in the absence of a warrant, a court order, exigent circumstances or parental

consent was unconstitutional." *Greene*, 588 F.3d at 1030. Rejecting any claim to exigent circumstances, the court of appeals found it significant that Petitioners waited three days between receiving the abuse report and interrogating S.G., and that Petitioners returned S.G. to her parents' custody after the allegedly incriminating interview. *Id.* at n.17.

The court of appeals evaluated whether the unconstitutionality of the seizure of S.G. was "clearly established" both under the court of appeals' holding concerning the applicability of warrant requirements and under the "lesser, 'special needs' reasonableness standard" Petitioners argued was applicable. *Id.* at 1030-31. Faced with a summary judgment, and thus lacking any findings of fact, the circuit court determined that Petitioners could have believed that the seizure of S.G. was justified at its inception but opined that it was a close question whether the seizure of S.G. was reasonable in scope. *Id.* at 1031. The court of appeals found that "[i]t is far from clear that it was reasonable" for Petitioners to detain and interrogate S.G. – a 9 year-old – for over an hour during which she claimed to have consistently denied any abuse, but "mindful of the difficult task facing social services caseworkers," it held that Petitioners were entitled to qualified immunity. *Id.* at 1032-33.

Notwithstanding that Petitioners prevailed at the district court and court of appeals, that they face no damages or injunctive relief, and that they seek to preserve the Ninth Circuit's ruling with respect to their lack of liability in this case, they sought certiorari. Because they seek review in a procedural posture in which they ask this Court not to undertake any analysis that may

affect the judgment in their favor, Petitioners focus on hypothetical seizures.

Camreta asserts that "***a*** seizure of ***a*** suspected child-abuse victim at her school ***is reasonable at its inception***." Camreta Brief 24 (emphasis added). *See also id.* at 34 ("This Court should thus conclude that seizures to investigate an allegation of child abuse by talking with the child at her school are constitutional at their inception."); 38 ("Having established that seizures of this sort are reasonable at their inception . . .").

Alford similarly concentrates on hypothetical seizures of hypothetical students: "Here, properly analyzed, a government official (including a police officer) acts reasonably when he or she, without a warrant, seizes a school-child based upon a reasonable suspicion that the child has suffered abuse and needs protection." Alford Brief 45. *See also id.* at 49 ("Seizures of this Type are Reasonable Because They Minimally Intrude on a Child's Privacy Interests"); 53 ("The Means by Which Seizures of this Type are Accomplished are Not Seriously Invasive").[2]

---

2. This case was disposed against Respondent and in favor of Petitioners on summary judgment and was reviewed by the court of appeals in that posture. Thus, development of the surrounding facts has been truncated, and there has been no resolution of disputed facts. Indeed, as this Court has indicated, issues of qualified immunity are to be resolved with limited or no discovery and at the earliest possible stage in litigation. *See Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009). But fully-developed facts are particularly critical in constitutional cases. *See Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 542 & n.5 (standing requirements to be applied strictly in deciding constitutional questions; "We have frequently recognized the importance of facts and the factfinding process in constitutional adjudication.")

Even Petitioners reveal their understanding that the record here is devoid of enough facts for this Court to make a determination on the Fourth Amendment question, where they have carefully changed the issue presented from the issue of the scope of the intrusion upon a nine year old girl, to the more narrow assertion that "at its inception," the search was constitutional. Although Camreta asks the Court to declare that the seizure of S.G. was "reasonable at its inception" – a question the court of appeals resolved in Petitioners' favor for qualified immunity, *see Greene*, 588 F.3d at 1031 – he strains to avoid inquiry into what the circuit court termed the "considerably closer question" of whether the seizure was reasonable in scope, particularly on the truncated, summary judgment record before the circuit and this Court. *Id.* at 1031-32. Camreta asks the Court to declare that a balancing test for reasonableness should be applied, but beseeches the Court not to inquire whether his own conduct met the required standards: "because Camreta is entitled to qualified immunity, this Court need not address the reasonableness of the scope of the seizure." Camreta Brief 40. He also concedes that the advisory opinion he seeks will have limited value in allowing officials to know ahead of time whether their actions will be constitutionally permissible: "the precise 'limitations which the Fourth Amendment place upon' an in-school interview of a suspected victim of child abuse 'will have to be developed in the concrete factual circumstances of individual cases.'" *Id.*, quoting *Terry*, 392 U.S. at 29. Alford similarly exhorts that the Court "has held that 'common sense and ordinary human experience must govern over rigid criteria," Alford Brief 56, *citing United States v. Montoya de Hernandez*, 473 U.S. 531, 542-43 (1985).

B. Non-Parties Deschutes County and the State of Oregon, Writing for Petitioners Alford and Camreta, Respectively, Seek an Advisory Opinion

In the absence of a live controversy concerning Petitioners' liability for the seizure of S.G., the State of Oregon and Deschutes County seek to use Petitioners as marionettes to obtain an advisory opinion concerning the application of Fourth Amendment analysis in hypothetical future investigations.

Camreta's petition, submitted by the Oregon Attorney General, contends that "the State is bound by the Ninth Circuit's ruling in this and all future cases." Camreta Brief 41. *See also id.* 43-44 ("[t]he State of Oregon – which appears on Camreta's behalf here – is bound by the Ninth Circuit's constitutional ruling in future cases").[3]

As with Oregon's references to "future cases," Deschutes County, writing for Alford, focuses on hypothetical seizures: "Seizures of this Type Are Reasonable . . . ." Alford Brief 36. *See also id.* 39, 43, 46, 49, 53 (referring to "Seizures of this Type").

But federal courts cannot issue "an opinion advising what the law would be on a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937); *see also United States v. Fruehauf*, 365 U.S. 146, 157

---

3. Indeed, in the brief it wrote on behalf of Camreta, the State of Oregon pretends that it has been a party to the case under review: "the State received a favorable judgment," *id.* 41; "the state (*sic*) prevailed on qualified immunity grounds . . . ." *Id.*

(1961) (Court will not give "advance expressions of legal judgment on issues which remain unfocused" because they lack the "clear concreteness" of questions that are necessary for decision in a truly adversary argument.). As the Court has repeatedly emphasized, "no justiciable controversy is presented . . . when the parties are asking for an advisory opinion." *Flast, supra*, 392 U.S. at 95. Here, the arguments of Camreta and Alford seek a sweeping declaration of law with respect to future cases that lack the concreteness of a live controversy. No answer to the question presented by the parties will alter the outcome of this case; Camreta and Alford face no liability for their actions in connection with their interrogation of S.G. in 2003. As in *Alvarez v. Smith*, 130 S. Ct. 576, 580-81 (2009), although the parties continue to dispute the lawfulness of the actions and procedures in question, "that dispute is no longer embedded in any actual controversy about the plaintiff's particular legal rights. Rather, it is an abstract dispute about the law" unlikely to affect plaintiff.

C. Petitioners and Amici Seek Advisory Opinions Concerning Questions Not Presented by the Parties

1. The Decision Under Review Is Narrower Than Represented by Petitioners and Amici Writing in Support of Petitioners

Petitioners here seek to have this Court review a decision in their favor from the Ninth Circuit Court of Appeals, asserting that "[t]he Fourth Amendment does not, as the Ninth Circuit concluded, categorically require a warrant based on probable cause for every seizure." Camreta Brief 14. But the court of appeals indicated

it was "consider[ing] the relatively straightforward question whether an in-school seizure and interrogation of a suspected child abuse victim is ***always permissible*** under the Fourth Amendment without probable cause and a warrant or the equivalent of a warrant . . . ." *Greene v. Camreta*, 588 F.3d at 1022 (emphasis added). The court of appeals studied Oregon law in effect at the time of the events in the case[4] to determine whether a child protective services investigation under that law is "so intimately intertwined with law enforcement as to render the special needs doctrine inapplicable." *Id.* at 1028 (quotation marks and citation omitted). The court of appeals held that using Oregon's state policy of "involving both police officers and caseworkers in the gathering and collection of evidence of child sexual abuse from the outset of an investigation" did not thereby "forge an exception to traditional Fourth Amendment protections for the criminal investigation of child sexual abuse." *Greene*, 588 F.3d at 1029. When the court applied "the traditional Fourth Amendment requirements, the decision to seize and interrogate S.G. in the absence of a warrant, court order, exigent circumstances, or parental consent was unconstitutional." *Id.* at 1030. Petitioners did not contest in proceedings at the court of appeals that their tactics constituted a seizure for Fourth Amendment purposes.

---

4. Alford indicates that the Oregon law examined by the court of appeals and discussed at length in his brief has changed since the time of his and Camreta's seizure of Respondent S.G. *See* Alford Brief 8 n. 3. This issue is discussed further in section IV below.

2. Amici and Petitioners read the question presented as being much more broad than the question this Court accepted, or ignore it altogether.

Amici writing in support of Petitioners likewise seek to have the Court issue broad declarations concerning application of the law to speculative facts far removed from those at issue in this case, applicable to entities not similarly-situated to parties in the case, and in some cases, to questions of law not disputed in the Ninth Circuit or ever in this case.

Comparison of Select Questions Presented

The following table illustrates the breadth of questions Petitioners and Amici seek to have the Court address.

Camreta Petition for Cert. adopted by this Court and Camreta Merits Brief:

Should the Ninth Circuit, as other circuits have done, instead have applied the balancing standard that this Court has identified as the appropriate standard when a witness is temporarily detained?

Brief	Question Presented	Topic for Court
Alford Merits Brief	Does the Fourth Amendment require a warrant, court order, parental consent or exigent circumstances before law enforcement and child welfare officials may conduct a temporary seizure and interview at a public school of a child whom they reasonably suspect was being sexually abused by her father?	Analysis to be applied to moot set of facts, as to which Petitioners already have judgment in their favor

Brief	Question Presented	Topic for Court
Arizona Prosecutor Attorneys Advisory Council	Absent egregious circumstances, when social workers or peace officers conduct public school interviews of suspected child abuse victims is the Fourth Amendment implicated?	Whether interviews of public school students under any circumstances can be seizures, an issue Petitioners conceded at the court of appeals and that no party briefed to the Court
Los Angeles County District Attorney on behalf of Los Angeles County and others	"An Interview of a Child at a Public School Regarding Suspected Abuse Is Not a Seizure Per Se under the Fourth Amendment . . ." p.3.	Application of Fourth Amendment to hypothetical situations

Brief	Question Presented	Topic for Court
Center on the Administration of Criminal Law	"The Center urges the Court to go further, however, and announce a broad, categorical rule that public school and state child services officials do not violate a minor school child's Fourth Amendment rights by conducting an interview of the child predicated on reasonable objective indicia of abuse, even where the interview includes passive participation by law enforcement." p. 3.	Declaration that all "interviews" of suspected victims by public school officials or child services officials, whether or not in school, either: 1) not seizures or 2) are per se reasonable, regardless of circumstances or location

Brief	Question Presented	Topic for Court
Cook County Public Guardian	"This Court should rule that the reasonableness standard set forth in New Jersey v. T.L.O. and Illinois v. Lidster applies to child protection investigations." p. 8.	Question concerning application of Fourth Amendment to hypothetical situations never at issue in this case at any level
Camreta Merits Brief	"[A] seizure of a suspected child-abuse victim at her school is reasonable at its inception." p. 24.	Declaration that all seizures of suspected victims at school are reasonable, regardless of facts

Amici – and Petitioners – seek advisory opinions concerning matters unconnected to the seizure and interrogation of S.G. The prohibition against advisory opinions is "'the oldest and most consistent thread in the federal law of justiciability . . . .'" *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (*quoting C. Wright*, Federal Courts 34 (1963)). Under Article III, this Court has long held that it lacks authority to provide such advisory opinions. "Early in its history, this Court held that it had no power

to issue advisory opinions, and it has frequently repeated that federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (citations omitted).

Amici, California State Association of Counties, League of California Cities, and California School Boards Association ("California Amici") argue that the Supreme Court is entitled to consider "antecedent issues" raised by the Amici, even if such issues were not considered by the courts below. *See* Brief of California Amici 7-10. *See also* Brief of Amici Los Angeles County District Attorney on Behalf of Los Angeles County, the California District Attorneys Association, the National District Attorneys Association, and the Arizona Prosecuting Attorneys' Advisory Council ("Los Angeles County Amici") 6-7. The California Amici argue that the issue of whether "absent egregious circumstances, public school interviews of suspected child abuse victims that are conducted by a social worker or a peace officer do not implicate the Fourth Amendment at their inception,"[5] *id.* at 7 (heading

---

5. These Amici misstate the court of appeals' holding, asserting that it "creat[ed] a *per se* rule that all public school interviews of suspected child abuse victims by law enforcement implicate the Fourth Amendment," Brief of California Amici 5, while the Ninth Circuit's holding framed the issue the opposite way, considering "whether an in-school seizure and interrogation is *always permissible* under the Fourth Amendment . . . ." *Greene*, 588 F.3d at 1021. It held only that general law of search warrants – under which not every interview is a seizure – applies to child abuse investigations. *Id.* at 1030. The Los Angeles County amici and the United States similarly misapprehend the court of appeals' holding. *See* Brief of Los Angeles County Amici 5; United States Brief 8.

capitalization omitted), can be considered by the Court – although not contested by the parties here or in the circuit court – because it is an "antecedent issue." *Id.* at 9.

The California Amici cite *Teague v. Lane*, 489 U.S. 288, 300 (1989) and *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697 (1984) as cases in which the Court considered issues raised by Amici but not parties. *See* Brief of California Amici 8. *See also* Brief of Los Angeles County Amici 7 (*citing Teague*).

In *Teague*, the Court considered an argument raised only in an amicus brief because the argument involved retroactivity questions, such questions had been briefed by the petitioner and respondent, and in prior cases the Court had addressed retroactivity of new rules of law *sua sponte* even though not raised in the lower courts or in the question presented for certiorari. *Id.* at 300-301.

In *Capital Cities*, the Court considered a federal preemption issue raised by amicus Federal Communications Commission where the conflict between state and federal law was plainly raised in the complaint, the district court had acknowledged the issue and made the necessary factual findings to resolve it, and the parties were given the opportunity to further brief it. *Capital Cities*, 467 U.S. at 697.

None of the authorities cited by Petitioner's Amici supports issuance of an advisory opinion on matters that were neither contested nor briefed by the parties before the court of appeals or this Court.

II. Petitioners lack standing to bring the present appeal because they have not shown that they were personally injured by the circuit court's holding or that Supreme Court review will redress any injury.

Petitioners lack standing to bring the present appeal. They prevailed in the underlying action and face no liability. Respondent has not appealed the decision of the court of appeals affirming the district court's summary judgment in favor of Petitioners. Review by this Court would not serve to redress any injury. Consequently, the petitions should be dismissed as having been improvidently granted.

Neither Petitioner has alleged in his briefing that he retains a personal stake in the litigation. Neither faces liability for the seizure of S.G. nor avers that he continues to seize children in public schools under the same circumstances. Certainly neither individual points to any record evidence that he is likely to do so. *See Bender v. Williamsport School District*, 475 U.S. 534, 546 & n.8 (1986) (facts "showing existence of a justiciable 'case' or 'controversy' under Article III[] must affirmatively appear in the record.").

"The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). In order to maintain an appeal, Petitioners must demonstrate that: (1) they are personally "aggrieved" by the ruling or judgment being appealed; (2) their injury is linked to the ruling being appealed; and (3) a favorable appellate decision is likely to redress their injury. *See Bender*,

475 U.S. at 542-44. Petitioners are not aggrieved – they won the case below. The court of appeals' ruling upheld summary judgment in their favor, and Respondent did not appeal. A favorable appellate decision cannot redress any injury; Petitioners cannot be any less liable for their actions vis-à-vis S.G. than they are under the court of appeals' decision.

At least one appellate court has held that parties who prevail on qualified immunity grounds lack the requisite injury or grievance for an appellate court to redress, and thus, lack standing to maintain an appeal. *Dixon v. Wallowa County*, 336 F.3d 1013, 1020-21 (9th Cir. 2003). The officials in *Dixon* prevailed at trial on the issue of qualified immunity but appealed the district court's failure to grant summary judgment in their favor. *Id.* Although the court of appeals agreed that the officials might have been aggrieved by being subjected to trial, citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), that damage could not be redressed. Here, the district court granted summary judgment in favor of Petitioners; they were not subjected to trial. As in *Dixon*, Petitioners are not entitled to review of the legal analysis employed by the court below because appellate review would not result in cognizable relief to them. If this Court reverses the Ninth Circuit's Fourth Amendment determination, nothing changes with respect to the outcome of the case against Camreta and Alford.

Petitioners have not cited any authority which establishes that either of them has standing to pursue this appeal. Petitioners argue that *Bunting v. Mellen*, 541 U.S. 1019 (2004), and *Pearson v. Callahan*, 129 S. Ct. 808 (2009), permit review of the Ninth Circuit's constitutional

determination. Camreta Brief 41-43.[6] But this Court in *Bunting* denied review. The concurring Justices reasoned that the Court lacked jurisdiction, as the court of appeals had determined that the petitioner was entitled to qualified immunity and respondents did not challenge that ruling, exactly as in this case. *See Bunting*, 541 U.S. at 1020 (Stevens, J., concurring). Justice Scalia's dissent, cited by Petitioners, agreed that "it is questionable whether Bunting's request for review can be entertained, since he ***won judgment*** in the court below." *Id.* at 1024 (Scalia, J., dissenting) (emphasis in original). Further, Justice Scalia indicated that the procedural tangle should be resolved "either [by] mak[ing] clear that constitutional determinations are ***not*** insulated from our review . . . or else drop any pretense at requiring the [*Saucier*] ordering in every case." *Id.* at 1025 (emphasis in original).

Contrary to Petitioners' argument, *Pearson* did not overturn settled precedent and provide prevailing parties with a right of review; instead it overruled *Saucier v. Katz*, 533 U.S. 194 (2001), in part to escape *Saucier*'s "depart[ure] from the general rule of constitutional avoidance." *Pearson*, 129 S. Ct. at 821. Although Petitioners here complain that some decisions may be unreviewable, the Court in *Pearson* made clear that "most of the constitutional issues that are presented in § 1983 damages actions . . . also arise in cases in which that [qualified immunity] defense is not available, such as criminal cases and § 1983 cases against a municipality," *Pearson*, 129 S. Ct. at 822. Indeed, this case might present just such an opportunity for review,

---

6. Alford adopted Camreta's arguments concerning whether the Court can review the court of appeals' decision in their favor. *See* Alford Brief 4 n.1.

as Respondent made a *Monell* claim against Deschutes County, Alford's employer, and Deschutes County obtained summary judgment by claiming that Alford's actions were not pursuant to policy or practice. *Greene*, 2006 U.S. Dist. LEXIS at *13-14, 25. Deschutes County, writing for Alford, now claims that "[t]he seizure in this case was undertaken pursuant to Oregon's child welfare statutes,"[7] Alford Brief 29, and describes Alford's actions with respect to S.G. as "a routine investigative technique used by law enforcement and child protection agencies" in Oregon and elsewhere. Alford Petition 14.

Neither *Bunting* nor *Pearson* alters the requirements for Article III standing or establishes that a petitioner who has prevailed on the basis of qualified immunity has standing to pursue a further appeal.

Other instances in which this Court has declined review because the petitioner prevailed in the court below dictate that the writ should be dismissed in this case. For example, in *California v. Rooney*, 483 U.S. 307, 311 (1987), the Court refused to review a judgment in favor of the state where the California Court of Appeals reached its decision through analysis that was "adverse to the State's long term interests." In *Rooney*, the trial court dismissed illegal gambling activity charges against respondent after finding a Fourth Amendment violation. *Id.* at 309-310. On appeal, the California Court of Appeals *agreed* with the

7. Since the granting of the Writ in this case, Respondent filed a motion with the district court seeking relief from the judgment in favor of Deschutes County based on the County's assertions on behalf of Alford before this Court. The district court denied the motion due to the pendency of these proceedings, indicating that it may take up the issue if the case is remanded. Dkt. No. 139.

trial court that a search of a communal trash bin outside respondent's home was unreasonable and that the evidence from that search was properly excluded. *Id.* But the Court of Appeals *disagreed* with the trial court's finding that without the evidence from the trash, police otherwise lacked probable cause to secure a warrant to search Respondent's apartment, where police found additional incriminating evidence the State sought to use at trial. *Id.* Instead, the Court of Appeals held that the additional information proffered by police to support the search warrant application carried enough independent weight to furnish probable cause to search the apartment. *Id.* The State – but not the respondent – sought review before this Court, which granted the writ of certiorari, *id.* at 310-311, but after oral argument the Court dismissed the writ as improvidently granted. *Id.* The Court explained that the court of appeals could have avoided the constitutional question of the trash search altogether, while still reaching the merits of the constitutionality of the search of Respondent's apartment and his arrest; the judgment of the California Court of Appeals was "entirely in the State's favor." *Id.* at 311. "'This Court 'reviews judgments, not statements in opinions,'" even when a lower court's analysis "may have been adverse to the State's long-term interests." *Id.* (quoting *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956)).

Just as in *Rooney*, Petitioners here received a judgment in the court below that was "entirely in their favor" and were the prevailing parties. Also like *Rooney*, the circuit court here was not required to address, and thus could have avoided, the constitutional question of the in-school seizure and instead proceeded directly to the question of qualified immunity. *Rooney* expressly

precludes a prevailing party from seeking review in the Supreme Court where the analysis in the court below was "adverse" to the petitioning party's "long term interests," even if it constitutes binding precedent in that jurisdiction. *Id.* at 311-313. By seeking review, Petitioners ask this Court to skirt this critical principle of constitutional law.

Petitioners contend that this Court's review is mandated because the Ninth Circuit weighed in on a constitutional question it need not have reached. Petitioner claims that the judgment below on qualified immunity grounds should not prevent review of the constitutional question "particularly [because] the Ninth Circuit was not compelled to reach the constitutional issue but nevertheless did so to provide 'guidance to those charged with the difficult task of protecting child welfare within the confines of the Fourth Amendment." *Camreta Petition* at 26. *Rooney* forecloses this argument as well. 483 U.S. at 311 ("That the Court of Appeal even addressed the trash bin issue is mere fortuity; it could as easily have held that since there was sufficient evidence to support the search even without the trash evidence, it would not discuss the constitutionality of the trash search.").

The Ninth Circuit's discussion of a constitutional precedent does not require this Court's review independent of all other requirements and in violation of the parameters for an Article III court. Petitioners erroneously argue for reviewability because the court of appeals "expressly" intended to "create constitutional precedent." *Camreta Petition* at 28. Petitioners' reading of *Pearson v. Callahan* is incorrect. *Pearson* overturned the rule previously established in *Saucier v. Katz*, 533 U.S. 194 (2001) that required courts to consider a civil rights plaintiff's

constitutional claims before addressing whether a defendant is entitled to qualified immunity. 129 S. Ct. 808 (2009). The *Pearson* Court modifies the *Saucier* rule by allowing federal district and appellate courts, in their discretion, to review the qualified immunity issue first and thereby potentially avoid having to reach the underlying constitutional question in cases not well-suited for review of that issue. 129 S. Ct. at 820. However, *Pearson* does not hold, or even intimate, that a prevailing party could seek review of a collateral adverse constitutional ruling whenever a trial or appellate court opts not to review the qualified immunity issue first but proceeds to reach the underlying constitutional question as the Ninth Circuit did in the instant case. And *Pearson* certainly did not authorize appeals whenever a prevailing party desires to rectify an adverse ruling that has been rendered moot by qualified immunity.

Only the United States, writing as amicus curiae, so much as makes a nod in the direction of the standing inquiry. Without citation to anything in the record, the United States contends that "Petitioners in this case have standing because it effectively prohibits them from job-related activities in which they would otherwise engage." Brief for United States as Amicus Curiae Supporting Petitioners ("U.S. Brief") 9. *See also id.* 16 (court of appeals' ruling "prevents petitioners from engaging in a 'routine investigative technique,'" citing Alford Petition 14 and Camreta Petition 11).[8] But Camreta and Alford's briefs contain no averment that either is likely to conduct

8. Neither petition for certiorari cites record evidence in support of the routine nature or frequency of interviews such as that of S.G.

such an interview in the future, nor does the record appear to contain any such evidence.

The United States cites *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 334 (1980) for the proposition that in certain instances the prevailing party may appeal from an "adverse ruling collateral to the judgment on the merits." U.S. Brief 15. However, the holding in *Deposit Guaranty* does not alter the requirement that a petitioner must meet the standing requirements of Article III. In fact, the Court in *Deposit Guaranty* held that such a collateral appeal will be permitted only "so long as that party retains a stake in the appeal satisfying the requirements of Art. III." *Deposit Guaranty*, 445 U.S. at 334. In *Deposit Guaranty*, the Court recognized that Petitioners seeking to appeal denial of class action certification had standing to seek an appeal, as they had alleged an individual interest and a personal stake in the outcome of the appeal. 445 U.S. at 336-37. Such is not the case here, as Petitioners have no personal stake in the outcome of the appeal – Petitioners are shielded by qualified immunity.

The United States also argues that review is permitted under *Electrical Fittings Corp. v. Thomas & Betts Co.*, 307 U.S. 241 (1939). U.S. Brief 16. In *Electrical Fittings*, the Supreme Court granted review sought by a successful defendant in a patent infringement case in which the decree of judgment purported to judge the validity of a patent claim in favor of the plaintiff, although that issue was not necessary to the judgment in the case. *Id.* at 242 ("here the decree itself purports to adjudge the validity of claim 1, and though the adjudication was immaterial to the disposition of the cause, it stands as an adjudication of

one of the issues litigated.") *Cf.* Fed. R. Civ. P. 58(a). *See also* Docket Nos. 89, 90 (J.A. 7). The Court in *Electrical Fittings* indicated that it had jurisdiction "to entertain the appeal, not for the purpose of passing on the merits, but to direct the reformation of the decree." *Id.* According to the Court in *Deposit Guaranty*, "In a sense, the petitioner in *Electrical Fittings* sought review of the District Court's procedural error." *Deposit Guaranty*, 445 U.S. at 335 n.7. Perhaps more importantly, the validity of the unexpired patent claim in *Electrical Fittings* remained live because the validity of that exact patent claim could be the subject of further litigation. The seizure of S.G. by Petitioners, a one-time event that occurred in 2003, presents no such ongoing issue applicable to parties and non-parties alike. Unlike the issue of validity of a given patent claim, every future interview of a child at school will necessarily be distinguishable.

III. The case should be dismissed as moot

A. Petitioners and Respondent Lack a Personal Stake in the Appeal

It is a fundamental principle of constitutional law that this Court decides only live cases and controversies and will not consider the merits of a moot appeal. U.S. Const. Art. III.; *see also Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). As the Court has recognized, Article III of the Constitution requires that an appeal be dismissed as moot when the parties can no longer claim a legally cognizable interest in the outcome, or when it becomes impossible for the court to grant any effective relief. *Lewis*, 494 U.S. at 477. To avoid having a case dismissed as moot, "it is not enough that a dispute was

very much alive when suit was filed, or when review was obtained in the Court of Appeals." *Id.* Rather, the parties must at all times have a "personal stake in the outcome of the lawsuit."[9] *Id.*; *see also Arizonans for Official English v. Ariz.*, 520 U.S. 43, 68 (1997) (describing mootness as "'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).'").

Regardless of how the Court resolves the one substantive question before it – whether the in-school seizure of S.G. was constitutional – the Court will not grant any party any effective relief as is required by Article III. Specifically, because Respondent did not appeal the court of appeals decision granting Petitioners qualified immunity, *Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009), *cert. granted*, 2010 U.S. LEXIS 8024, S.G. cannot prevail on her claim for damages under § 1983; she has no "personal stake" in the outcome of this appeal. Likewise, Petitioners lack a personal stake in the outcome because they prevailed in the judgment below. *Greene*, 588 F.3d at 1033; *Rooney*, 483 U.S. at 311 (dismissing petition for certiorari as improvidently granted where petitioner who prevailed in court below sought review based on

---

9. Petitions for review may be dismissed by this Court as having been improvidently granted. *Id.* at 684. Dismissal on this ground may occur at any time, even after oral argument. *See Iowa Beef Packers, Inc. v. Thompson*, 405 U.S. 228, 229-230 (1972). Likewise, claims of mootness may be raised at any time by the reviewing court, *see e.g. Montana v. Imlay*, 506 U.S. 5, 5 (1992) (Stevens, J., concurring), by a party, *see Taylor v. McElroy*, 360 U.S. 709, 710 (1959), or by an *amicus curiae*, *see e.g. County of Los Angeles v. Davis*, 440 US 625, 642 (1979) (Powell, J., dissenting).

lower court's "adverse" reasoning); *Alvarez*, 130 S. Ct. at 580-81 (remanding for dismissal where plaintiffs' specific property claims had been resolved, notwithstanding ongoing dispute concerning constitutionality of hearing procedures in question).

Petitioners' analysis simply fails to understand the significance of leaving the court of appeals' decision unreviewed. If this Court were to find that Petitioners' actions were in violation of the Fourth Amendment, as the court of appeals did, qualified immunity would prevent S.G.'s suit from continuing against Petitioners. If this Court were to disagree with the court of appeals and find no Fourth Amendment violation, the district court's summary judgment ruling would still stand, and the outcome of the court of appeals' ruling upholding the dismissal would still stand. The result of the underlying case changes in neither circumstance.

This Court has on several occasions dismissed a claim as moot because, due to intervening events, a party no longer has a stake in the outcome. *See, e.g., Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990) (case mooted by federal legislation that eliminated an out-of-state bank's Commerce Clause challenge to the denial of its application for a banking license); *Spencer v. Kemna*, 523 U.S. 1 (1998) (case mooted where petitioner's completion of his prison sentence eliminated alleged collateral harm caused by decision to revoke his parole). Similarly, in the one case reviewed by this Court where the petitioner prevailed in the court below based on qualified immunity, this Court dismissed the claim as moot. *Bunting v. Mellen*, 541 U.S. 1019, 1019-20 (2004) (Stevens, J., concurring) (denying the petition for certiorari where petitioner, former head of

military school, sought review of trial court holding that mandatory daily supper prayer violated the Establishment Clause where court below had entered judgment in favor of petitioner on qualified immunity grounds). As in *Bunting*, this Court lacks the power to alter the parties' rights in this dispute. Like *Bunting*, Petitioners prevailed in the Court of Appeals based on qualified immunity; also like *Bunting*, Petitioners seek review in the Supreme Court of the Court of Appeals' adverse constitutional ruling. As in *Bunting*, the Court should dismiss the writ as improvidently granted in this case.

B. The Oregon Laws Relied Upon By the Ninth Circuit and Petitioners Have Been Revised

Petitioners' claimed fears about the effects of the court of appeals' opinion on the conduct of future investigations appear to be moot. Alford concedes in his brief that "[t]he statutes and regulations at issue in this case have undergone revisions since these events occurred." Alford Brief 8 n.3. Alford devotes a substantial part of his brief to these statutes. *See* Alford Brief 8 n.3, 29-33, 40, 42 and 63. *See also* Camreta Brief 3, 4, 26, 28, 33, 43. Yet the court of appeals addressed only whether Oregon's relevant statutes and regulations at the time of the investigation triggered a "special needs exemption" from normal warrant or warrant-exception requirements. Alford fails to explain the subsequent changes to the statutes and regulations. For example, Alford cites Or. Rev. Stat. § 418.747, but there is no citation – or even assertion – that his and Camreta's actions with respect to S.G. complied with the written protocol requirements of subsection (2), the training requirements of subsection (3), or the limited authority to proceed in absence of all required

personnel "only for as long as reasonable danger to the child exists" as set forth in subsection (5). Or. Rev. Stat. § 418.747. *See also* Alford Brief 42 & n.27.[10] The changes in the regulatory regime, which are not explained by Petitioners, provide another reason that certiorari should be dismissed because the appeal is moot.

IV. The Court Should Dismiss the Petition as Improvidently Granted for Prudential Reasons

This Court should dismiss the Writ of Certiorari as improvidently granted for prudential reasons even if it concludes that the case remains justiciable. The Ninth Circuit's decision below represents neither a conflict among the circuits nor a deviation from precedents of this Court.

Camreta contended in his petition for certiorari that the "Circuit Courts of Appeal are divided," Camreta Pet. at 22, and cites *Gates v. Texas Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 429 (5th Cir. 2008), *Tenenbaum v. Williams*, 193 F.3d 581 (2d Cir. 1999), *Doe v. Bagan*, 41 F.3d 571 (10th Cir. 1994) and *Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986). Camreta Pet. at 24. However, there is no direct conflict among the circuits on the issue of whether law enforcement personnel must comply with warrant/probable cause in child abuse investigations, as contrasted to investigations conducted *solely* by child welfare personnel without law enforcement involvement.

---

10. If Alford contends that his participation was in compliance with the current regulatory scheme in this context, such contention would appear to undermine Deschutes County's summary judgment based on lack of policy or practice in its investigation. *See supra* Section III above.

In *Gates*, caseworkers took the children to a specialized central facility "created with the purpose of reducing trauma to the possible victims of child abuse by coordinating child abuse investigations among the various branches of government" pursuant to a specific state statute. 537 F.3d at 432. The Fifth Circuit held that "before a *social worker* can remove a child from a public school for the purpose of interviewing him in a central location without a court order, the *social worker* must have a reasonable belief that the child has been abused and probably will suffer further abuse upon his return home at the end of the school day"; the court found that authorities had violated the Fourth Amendment but were entitled to qualified immunity. *Id.* at 433-34 (emphasis added). *Gates* did not hold that warrantless seizure of a student could be acceptable where, as here, several days passed between the report of possible abuse to the caseworker and the interview of the child at school. The seizures addressed in *Darryl H. v. Coler*, 801 F.2d 893 (7th Cir. 1986), and *Doe v. Bagan*, 41 F.3d 571 (10th Cir. 1994) were also performed solely by caseworkers and did not resemble criminal investigations. *Bagan* relied on the lack of evidence "to suggest that the interview with Bagan involved any of the raiments of arrest . . . this was simply an interview by a caseworker incident to an ongoing child abuse investigation." *Id.* at 575 n.3.

The absence of a direct conflict between circuits militates against review. *See Bunting*, 541 U.S. at 1021 ("The second reason justifying a denial of certiorari is the absence of a direct conflict among the Circuits," distinguishing decisions from different circuits.) *See also Singleton v. Commissioner*, 439 U.S. 940, 945 (1978) ("With respect to the Court's action in this case, the

absence of any conflict among the Circuits is plainly a sufficient reason for denying certiorari."); Supreme Court Rule 10(a).

CONCLUSION

Petitioners, who prevailed in the district court and court of appeals, have nothing to lose through this Court's review of the matter: the district court's judgment in their favor has not been appealed. Likewise, Respondent has nothing to gain. Thus, this case presents only an opportunity for the Court to engage in a legislative function and issue an advisory opinion that may have vast unintended consequences. Amicus curiae Legal Services for Children requests that this Court dismiss the petitions for review as improvidently granted.

Respectfully submitted,

JOHN A. BASINGER
Counsel of Record
MICHAEL ATKINS
IRENE V. GUTIERREZ
SAHANG-HEE HAHN
ANGELA C. VIGIL
BAKER & MCKENZIE LLP
1114 Avenue of the Americas
New York, NY 10036
(212) 626-4463
john.basinger@bakermckenzie.com

Counsel for Amicus Curiae

Consolidated Nos. 09-1454 and 09-1478

IN THE SUPREME COURT OF THE UNITED STATES

JAMES ALFORD, Deschutes County Deputy Sheriff, Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor and K.G., a minor, Respondents

BOB CAMRETA, Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor and K.G., a minor, Respondents

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief for Amicus Curiae Liberty Counsel in Support of Respondents

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
LIBERTYCOUNSEL
1055 Maitland Center Commons, 2d Floor
Maitland, FL 32751
(800) 671-1776
Email: court@lc.org

Stephen M. Crampton
Mary E. McAlister
LIBERTY COUNSEL
PO Box 11108
Lynchburg, VA 24506
(434) 592-7000
Attorneys for Amicus

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

LEGAL ARGUMENT 5

I. PETITIONERS VIOLATED RESPONDENTS' FUNDAMENTAL LIBERTY INTERESTS IN THE INTEGRITY OF THEIR FAMILY WHEN THEY SEIZED S.G. AND INTERROGATED HER WITHOUT PARENTAL NOTICE OR CONSENT. 5

II. THE DIMINISHED EXPECTATION OF PRIVACY ACCORDED PUBLIC SCHOOL STUDENTS SUBJECTED TO SEARCHES BY SCHOOL OFFICIALS IS INAPPLICABLE TO THIS NON-SCHOOL RELATED INTERROGATION THAT HAPPENED TO OCCUR ON SCHOOL PROPERTY. 9

A. *T.L.O.* Is Inapplicable Here Because This Was Not A Search Carried Out By School Authorities In Furtherance Of The Need To Maintain Discipline In The Schools..... 10

B. The *Vernonia* And *Pottawatomie County* Cases Are Inapplicable Here Because This Search Was Not Carried Out By School Authorities In Furtherance Of Their Custodial Responsibility Over Students. 13

III. GOVERNMENT AGENTS SHOULD NOT BE PERMITTED TO CIRCUMVENT FOURTH AMENDMENT STANDARDS FOR IN-HOME INTERROGATIONS OF CHILDREN BY MOVING THE INTERROGATIONS TO A PUBLIC SCHOOL. 16

A. With The Protective Shield Of T.L.O., Vernonia And Pottawatomie County Unavailable, Petitioners Were Required To Follow Precedents Establishing That Fourth Amendment Restrictions Must Be Followed During Child Abuse Investigations. 17

B. Petitioners Should Not Be Permitted To Circumvent The Statutory Protections Congress Put In Place To Protect Families' Fourth Amendment Rights During Child Abuse Investigations..... 25

IV. GOVERNMENT AGENTS SHOULD BE REQUIRED TO PRESENT CLEAR AND CONVINCING EVIDENCE OF CAUSE FOR EMERGENCY REMOVAL BEFORE HAVING ACCESS TO CHILDREN FOR INTERROGATION WITHOUT NOTICE OR CONSENT OF THEIR PARENTS. 29

CONCLUSION 34

TABLE OF AUTHORITIES

Cases

Addington v. Texas,
441 U.S. 418 (1979) 29, 30

Bd. of Educ. of Indep. School Dist. No. 92 of Pottawatomie County v. Earls,
536 U.S. 822 (2002 ..... 10, 14, 15,18

Boddie v. Connecticut,
401 U.S. 371 (1971) 8

Calabretta v. Floyd,
189 F.3d 808 (9th Cir. 1999) 3, 17-19

Croft v. Westmoreland County Children and Youth Services,
103 F.3d 1123 (3d Cir. 1997). 20

Doe v. Heck,
327 F.3d 492 (7th Cir. 2003) 18, 22

Greene v. Camreta,
588 F.3d 1011 (9th Cir. 2009). 3, 24, 30

Griswold v. Connecticut,
381 U.S. 479 (1965) 6

Kovacs v. Cooper,
336 U.S. 77 (1949) 6

Meyer v. Nebraska,
262 U.S. 390 (1923) 5

M.L.B. v. S.L.J.,
519 U.S. 102 (1996) 8

Michael C. v. Gresbach,
526 F.3d 1008 (7th Cir. 2008) 1, 2

Michael H. v. Gerald D.,
491 U.S. 110 (1989) 8

New Jersey v. T.L.O.,
469 U.S. 325 (1985) 3, 9, 10-12, 17, 18

Parham v. J.R.,
442 U.S. 584 (1979) 7

Pierce v. Society of Sisters,
268 U.S. 510 (1925) 5

Picha v. Wielgos,
410 F. Supp. 1214 (N.D. Ill. 1976) 12

Prince v. Massachusetts,
321 U.S. 158 (1944) 5

Rogers v. County of San Joaquin,
487 F.3d 1288 (9th Cir. 2007) 18, 24, 25

Santosky v. Kramer,
455 U.S. 745 (1982) 7, 29-31

Smith v. Organization of Foster Families For Equality and Reform,
431 U.S. 816 (1977) 6

Stanley v. Illinois,
405 U.S. 645 (1972) 6

Troxel v. Granville,
530 U.S. 57 (2000) 2, 5, 8

Vernonia School Dist. 47J v. Acton,
515 U.S. 646 (1995) 9, 10, 13-15, 18

Wallis v. Spencer,
202 F.3d 1126 (9th Cir. 2000) 7,8, 18, 20-22

Statutes

42 U.S.C. §5106a 25, 26

Keeping Children and Families Safe Act of 2003, S. 342, Pub. L. No. 108-36, 117 Stat. 800 25

Other Authorities

Dorianne Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM & MARY L. REV. 413 (2005) 23, 25, 31-34

S. Rep. No. 108-12 (2003). 27-28

INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a national nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the family. Founded in 1989 by Anita and Mathew Staver, who also serves as the Dean of Liberty University School of Law, Liberty Counsel has offices in Florida, Virginia, Texas and Washington, D.C., and has hundreds of affiliate attorneys all across the nation. A significant part of Liberty Counsel's work has involved defending families against government infringement and intrusions upon fundamental parental rights. Specifically, Liberty Counsel has represented parents and children who have been subjected to searches and seizures that violate both the Fourth Amendment and fundamental parental rights. Liberty Counsel represented parents and their children who were subjected to searches on

---

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than the *amicus curiae* made a monetary contribution intended to fund its preparation or submission. The parties have consented to the filing of Amicus Briefs, and such consents are on file with this Court.

private school property, without notice and consent, in *Michael C. v. Gresbach*, 526 F.3d 1008 (7th Cir. 2008). In *Michael C.*, the court found that the parents and children had a legitimate expectation of privacy at the private school so that the searches of the children's bodies to investigate child abuse were presumptively unreasonable and that no exception to the warrant requirement was applicable. *Id.* at 1015-1016.

This case presents a similar clash between parental rights and the Fourth Amendment that threatens the sanctity of the family. Liberty Counsel's extensive background in issues surrounding parental rights has created a wealth of knowledge regarding the issues. Liberty Counsel believes its perspective on these issues can be of assistance in this Court's analysis. Liberty Counsel respectfully submits this Amicus Curiae Brief to provide this Court with information and arguments that may be of assistance in analyzing the constitutional issues raised by this case.

SUMMARY OF ARGUMENT

Most glaringly apparent, yet absent from Petitioners' presentation to this Court, is Petitioners' disregard of, disrespect for and interference with what this Court has described as "perhaps the oldest of the fundamental

liberty interests," *i.e.*, parents' interests in the care, custody and upbringing of their children. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). As the Ninth Circuit recognized, "parents have an exceedingly strong interest in directing the upbringing of their children, as well as in protecting both themselves and their children from the embarrassment and social stigmatization attached to child abuse investigations," and those rights were violated by Petitioners' actions. *Greene v. Camreta*, 588 F.3d 1011, 1015-1016 (9th Cir. 2009). Petitioners' failure to address those interests in their presentations to this Court does not make them any less critical to this Court's analysis.

Neither does Petitioners' use of a school office instead of the family home change the need to respect parental rights and Fourth Amendment rights when interrogating young children for purposes of potential criminal investigations. *Calabretta v. Floyd,* 189 F.3d 808, 820 (9th Cir. 1999). Petitioners attempted to circumvent the standard established in *Calabretta* by interviewing S.G. at school and then relying on the diminished expectation of privacy of public school students described by this Court in *New Jersey v. T.L.O.*, 469 U.S. 325, 340-341 (1985) to justify their actions. Conspicuously absent from Petitioners' analysis, however, is the fact that the lower

expectation of privacy has been accorded to school administrators only in the context of school discipline standards, not to all interrogations that happen to occur on school property. Consequently, *T.L.O.* does not provide Petitioners with a shield against complying with the Fourth Amendment requirements put in place in *Calabretta*.

Neither does it exempt Petitioners from complying with the statutory protections put in place by Congress in the Keeping Children and Families Safe Act of 2003. Congress re-emphasized the importance of protecting Fourth Amendment rights during child abuse investigations, and Petitioners' actions circumvent those standards in a way that threatens to disrupt family security.

Petitioners' actions illustrate the need for a stringent evidentiary standard for conducting child abuse investigations. The important state goal of preventing and responding to child abuse allegations must be balanced with the parents' and children's rights under the Fourth Amendment in a way that will ensure that the fundamental constitutional rights are respected and protected. State actors should have to present clear and convincing evidence before invading family privacy in the way Petitioners did here.

These issues should be thoroughly addressed and analyzed by this Court. They are critical to this Court's analysis of Respondents' constitutional rights, and to the precedent that will be set by this Court's decision.

LEGAL ARGUMENT

I. PETITIONERS VIOLATED RESPONDENTS' FUNDAMENTAL LIBERTY INTERESTS IN THE INTEGRITY OF THEIR FAMILY WHEN THEY SEIZED S.G. AND INTERROGATED HER WITHOUT PARENTAL NOTICE OR CONSENT.

For more than 85 years, this Court has recognized that the interest of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests protected by the Fourteenth Amendment. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-535 (1925). The child is not merely a creature of the State whose care can be doled out at the whim of a legislature, administrative agency or court. *Meyer*, 262 U.S. at 399-400; *Pierce*, 268 U.S. at 535; *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000). Instead, "[i]t is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include

preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). "And it is in recognition of this that these decisions have respected the private realm of family life which the state cannot enter." *Id.*

The fundamental interest in child-rearing pre-dates the founding of this country and the Bill of Rights. *Smith v. Organization of Foster Families For Equality and Reform*, 431 U.S. 816, 845 (1977) (citing *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)). "[T]he liberty interest in family privacy has as its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in "this Nation's history and tradition." *Smith*, 431 U.S. at 845. That is why "the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'" *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citing *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring)).

Even when, as is true here, there are allegations that one parent might have mistreated the children, the underlying liberty

interest, and the presumption that parents act in the best interest of their children, does not evaporate, and the state cannot seek to tear apart the family unit without giving due respect to both parents'–and the children's–liberty interests. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Wallis v. Spencer*, 202 F.3d 1126, 1142 (9th Cir. 2000). That is particularly true here, where there were no allegations against Sarah G., and therefore no justification for interfering with her rights vis-à-vis her children. *Wallis*, 202 F.3d at 1142 n.14. "The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions." *Parham v. J.R.*, 442 U.S. 584, 602 (1979). "More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children." *Id.* "That some parents 'may at times be acting against the interests of their children' creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests." *Id.* at 602-603. Petitioners could not disregard Sarah G's parental rights and deny her the right to be notified of, consent to and participate in the interrogation of her daughter merely because there were unproven

allegations made about the children's father. Petitioners further disregarded Sarah G.'s rights when they failed to even address the issue in their presentation to this Court.

Petitioners' disregard for Respondents' familial rights is not trivial. "Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (citing *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971)). That explains the "historic respect–indeed, sanctity would not be too strong a term–traditionally accorded to the relationships that develop within the unitary family." *Michael H. v. Gerald D.*, 491 U.S. 110, 123 (1989). "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Id.* at 123-124. Absent allegations (and perhaps proof) that Sarah G. posed a danger to her children or was otherwise unfit, Petitioners could not intrude upon the sanctity of the family either directly by interrogating the children at home, or surreptitiously by seizing S.G. and interrogating her at school without

even bothering to notify Sarah G. *Wallis,* 202 F.3d at 1142 n.14, *See also, Troxel,* 530 U.S. at 68-69 ("[S]o long as a parent adequately cares for his or her children (*i.e.,* is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.").

Petitioners' failure to address Respondents' familial rights does not render those rights and Petitioners' interference with those rights non-existent. This Court should not ignore the significant intrusions into the sanctity of the family unit, but should analyze Petitioners' actions through the lens of the fundamental rights accorded to Sarah G. and her children.

II. THE DIMINISHED EXPECTATION OF PRIVACY ACCORDED PUBLIC SCHOOL STUDENTS SUBJECTED TO SEARCHES BY SCHOOL OFFICIALS IS INAPPLICABLE TO THIS NON-SCHOOL RELATED INTERROGATION THAT HAPPENED TO OCCUR ON SCHOOL PROPERTY.

The mere fact that Petitioners chose a school office as the venue for their interrogation

of S.G. does not bring it within this Court's precedents that have recognized a lowered expectation of privacy for public school students in certain circumstances. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Bd. of Educ. of Indep. School Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002). In those cases, this Court explicitly distinguished school officials conducting searches pursuant to their duties to maintain order and discipline, in which the lowered expectation is appropriate, from law enforcement searches and seizures outside of the academic context, in which it is not. Petitioners' actions constitute the latter category which must comport with the Fourth Amendment standards required for investigations conducted in the family home.

A. *T.L.O.* Is Inapplicable Here Because This Was Not A Search Carried Out By School Authorities In Furtherance Of The Need To Maintain Discipline In The Schools.

In *T.L.O.* this Court held that in the context of in-school searches by school officials exercising their duty to maintain order, the Fourth Amendment does not require a warrant or probable cause. *T.L.O.*, 469 U.S. at 341. This

Court upheld a school officials' search of a student's purse for cigarettes and marijuana on the basis of individualized suspicion that she had violated school rules, *i.e.*, that she had been smoking in the lavatory. *Id.* at 346-347. The *T.L.O.* analysis is instructive for demonstrating why it cannot be used to justify Petitioners' actions here. *Id.* at 340-341.

The Court discussed the need to strike a balance between the student's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place. *Id.* at 340. School officials' need for and duty to maintain decorum and discipline requires some easing of the restrictions normally placed upon public authorities under the Fourth Amendment. *Id.* These "special needs" make the warrant and probable cause requirements impracticable in the public school context because they would undercut "the substantial need of teachers and administrators for freedom to maintain order in the schools." *Id.* at 340-341. The Court explicitly limited its holding to school officials exercising their duty to maintain order. *Id.* at 342.

> We here consider only searches carried out by school authorities acting alone and on their own

> authority. *This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question.*

Id. at 342 n.7. (emphasis added) (citing *Picha v. Wielgos*, 410 F. Supp. 1214, 1219-1221 (N.D. Ill. 1976) (holding that students in public schools were not relieved of the protection of the Fourth Amendment except to the extent that a compelling state interest in the maintenance of school activities, particularly discipline, required). By its explicit terms, therefore, *T.L.O.* is inapplicable to this interrogation which was not conducted by school officials acting on their own authority in furtherance of their duty to maintain discipline. Petitioners are not school administrators, and they are not investigating a possible violation of school rules. Petitioners are law enforcement and county welfare officials investigating allegations of child abuse. Their choice to use a room at the school instead of the student's home did not place them under the protection of *T.L.O.*'s lowered standards.

B. The *Vernonia* And *Pottawatomie County* Cases Are Inapplicable Here Because This Search Was Not Carried Out By School Authorities In Furtherance Of Their Custodial Responsibility Over Students.

Similarly, Petitioners cannot rely upon the relaxed Fourth Amendment standards approved in *Vernonia*, 515 U.S. at 656, to justify their actions. In *Vernonia*, this Court found that school policy requiring suspicionless drug testing for athletes did not violate students' Fourth Amendment rights. *Id.* at 664-665. "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." *Id.* at 656. "For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated

against various diseases." *Id.* Somewhat like adults who choose to participate in a "closely regulated industry," students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy. *Id.* at 657. As it did in *T.L.O.*, this Court carefully limited its holding. *Id.* at 665. "We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts." *Id.* "The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care." *Id.*

That element was also critical in *Pottawatomie County*, where this Court upheld a school policy requiring drug testing for students involved in non-athletic extracurricular activities. *Pottawatomie County*, 536 U.S. at 829-830. Parents challenging the policy tried to distinguish it from the policy upheld in *Vernonia* because the *Pottawatomie County* policy involved non-athletic programs. *Id.* The Court rejected that distinction, holding that athletics versus non-athletics was not the critical factor. *Id.* at 831. What was critical was the fact that the policy was implemented as part of the school's

custodial responsibility and authority over students. *Id.* at 831. The Court pointed out that students in extracurricular activities voluntarily subjected themselves to many of the same intrusions as did athletes and like athletes were required to comply with regulations and restrictions not imposed on the student body as a whole. *Id.* at 832. Therefore, they had the same lowered expectation of privacy as did student athletes, and could be subjected to the same suspicion-less, warrant-less drug testing as were athletes, but only for school-related discipline and safety purposes. *Id.*

Another significant factor in *Pottawatomie County* and *Vernonia* was the limited use of the information gathered during the drug testing. *Id.* at 833; *Vernonia*, 515 U.S. at 658. The test results were not turned over to law enforcement nor even used as a basis for disciplinary proceedings, but were used only to protect students from injury and discourage drug use by withholding the privilege of participating in extracurricular activities. *Pottawatomie County* 536 U.S. at 833; *Vernonia*, 515 U.S. at 658. In this case, by contrast, the information was not only turned over to, but was actually gathered by law enforcement officials for use in a criminal investigation. In addition, the interrogation

was not conducted by school officials acting in their capacities as guardians of the academic environment, but by county officials seeking to avoid the restrictions attendant to an interrogation in the family home.

Moving the seizure and interrogation of S.G. from the family's residence to a school office did not shield Petitioners from the requirements of the Fourth Amendment. A mere change in locale did not transform the criminal investigation of alleged child abuse by a county child protection officer and deputy sheriff into a school discipline investigation by a principal or superintendent. The lessened expectation of privacy accorded to students in the latter circumstances cannot be applied to relieve Petitioners of their obligations under the Fourth Amendment.

III. GOVERNMENT AGENTS SHOULD NOT BE PERMITTED TO CIRCUMVENT FOURTH AMENDMENT STANDARDS FOR IN-HOME INTERROGATIONS OF CHILDREN BY MOVING THE INTERROGATIONS TO A PUBLIC SCHOOL.

The courts and Congress have made it clear that social welfare workers and law enforcement must respect Fourth Amendment

rights when they engage in child abuse investigations. Absent consent, a warrant or proof of exigent circumstances, child welfare workers and law enforcement cannot unilaterally seize a child and interrogate or examine her, regardless of whether they are in the family home or, as in this case, a school.

A. With The Protective Shield Of *T.L.O.*, *Vernonia* And *Pottawatomie County* Unavailable, Petitioners Were Required To Follow Precedents Establishing That Fourth Amendment Restrictions Must Be Followed During Child Abuse Investigations.

As the Ninth Circuit correctly held, *T.L.O.* does not impose a blanket suspension of Fourth Amendment requirements anytime a child is involved. *Calabretta v. Floyd,* 189 F.3d 808, 816 (9th Cir. 1999). Nor does it create a universal exception to the Fourth Amendment every time a government official enters upon school property, as Petitioners claim. *T.L.O.*, 469 U.S. at 342 n.7. Rather than excusing Petitioners from Fourth Amendment safeguards, *T.L.O.*, *Vernonia* and *Pottawatomie County* point to why Petitioners were not exempt from the Fourth Amendment merely

because they conducted their interrogation at school. In all three cases, this Court emphasized that the exemption from a warrant and probable cause extended *only* to *school officials* conducting investigations *as part of their duty to maintain order and discipline.* *T.L.O.*, 469 U.S. at 342; *Pottawatomie County* 536 U.S. at 833; *Vernonia*, 515 U.S. at 658. Importantly, this Court also emphasized that the exemptions were acceptable because there was **no** law enforcement involvement, either in the investigations or in analyzing the results. *T.L.O.*, 469 U.S. at 342; *Pottawatomie County* 536 U.S. at 833; *Vernonia*, 515 U.S. at 658. Law enforcement is at the heart of the investigation in this case, making the exemptions granted in *T.L.O.*, *Veronina* and *Pottawatomie County* wholly inapplicable, regardless of the fact that the investigation took place at school.

With the shield of the school venue rendered ineffective, Petitioners are faced with the binding precedent of *Calabretta* and subsequent cases which have firmly established that social workers and police officers violate the Fourth Amendment when they invade the sanctity of the family and interrogate children without the consent of their parents and absent exigent circumstances, regardless of whether they are on school property. *Calabretta*, 189 F.3d at 820; *Wallis*, 202 F.3d at 1142; *Rogers v.*

County of San Joaquin, 487 F.3d 1288, 1297 (9th Cir. 2007); *Doe v. Heck*, 327 F.3d 492, 512-513 (7th Cir. 2003).

In *Calabretta*, the Ninth Circuit held that a social worker and police officer violated a mother and child's Fourth Amendment rights when they unlawfully entered the family home without a warrant and forced the mother to assist in a strip search of her child. 189 F.3d at 820. "An unlawful entry or search of a home does not end when the government officials walk across the threshold. It continues as they impose their will on the residents of the home in which they have no right to be." *Id.* "An essential aspect of the privacy of the home is the parent's and the child's interest in the privacy of their relationship with each other." *Id.*

That interest was egregiously violated in this case when the Petitioners decided to bypass the home entirely–and thereby deprive Sarah G. and S.G. of the ability to even assert their Fourth Amendment rights–and instead go to S.G.'s school to seize and interrogate her without Sarah G.'s knowledge or consent. As the Ninth Circuit wrote, the government's interest in the welfare of children "embraces not only protecting children from physical abuse, but also protecting children's interest in

the privacy and dignity of their homes and in the lawfully exercised authority of their parents." *Id.* Respondents had no opportunity to even assert those rights, let alone exercise them, because of Petitioners' decision to circumvent *Calabretta* by showing up at S.G.'s school. Petitioners should not be permitted to manipulate the circumstances in order to avoid complying with the Fourth Amendment.

The fact that Petitioners were investigating allegations against *one* of the parents does not justify their deprivation of the *other* parent's or the children's rights. *Wallis*, 202 F.3d at 1142.

> We note that the claims of each family member must be assessed separately. Here, nothing in the record before us suggests that Becky Wallis was anything other than a fit and loving mother. As the Third Circuit recently held, a state has no interest whatever in protecting children from parents unless it has some reasonable evidence that the parent is unfit and the child is in imminent danger. *Croft [v. Westmoreland County Children and Youth Services]*, 103 F.3d [1123] at 1125

> [(3d Cir. 1997)]. *The government may not, consistent with the Constitution, interpose itself between a fit parent and her children simply because of the conduct–real or imagined–of the other parent.*

Id. at 1142 n.14 (emphasis added). The *Wallis* court's discussion of the nature and scope of parents' and children's rights during child abuse investigations is instructive in illustrating the constitutional problems with Petitioners' attempt to evade the Fourth Amendment by interrogating S.G. at school. *Id.* at 1142. "[P]arents have a right arising from the liberty interest in family association to be with their children while they are receiving medical attention (or to be in a waiting room or other nearby area if there is a valid reason for excluding them while all or a part of the medical procedure is being conducted)." *Id.* "Likewise, children have a corresponding right to the love, comfort, and reassurance of their parents while they are undergoing medical procedures, including examinations–particularly those, such as here, that are invasive or upsetting." *Id.* "The interest in family association is particularly compelling at such times, in part because of the possibility that a need to make medical decisions will

arise, and in part because of the family's right to be together during such difficult and often traumatic events." *Id.*

In *Heck*, the Seventh Circuit found that county child welfare workers had violated the Fourth Amendment when they interrogated a student regarding corporal punishment on a private school campus without a warrant or consent. *Heck*, 327 F.3d at 515. The court found that the on-campus search and seizure was presumptively unreasonable, but would also be found unconstitutional if the usual Fourth Amendment test for reasonableness would apply. *Id.* "In conducting this test, we do not consider the government's interest in the abstract (*i.e.*, the state's general interest in protecting children from abuse), but instead evaluate whether, under the circumstances of a particular case, the government officials in question had "some definite and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse." *Id.* (citing *Wallis*, 202 F.3d at 1138). There was no such evidence in *Heck* and no such evidence in this case, making Petitioners' actions here unconstitutional.

In *Wallis*, the court was specifically addressing invasive physical examinations instead of the interrogation involved in this

case, but the relative rights of the non-accused parent and the child are no less relevant here than in *Wallis*. As one scholar said regarding the child abuse investigation process:

> Indeed, despite the authorities' best intentions, the process can be harmful in two related ways. First, the investigations undermine the fundamental values of privacy, dignity, personal security, and mobility that are protected by the Fourth Amendment. It is critical in this regard that the Fourth Amendment uniquely has been interpreted to recognize the child's own individual interest in these values, by guarding her right also to be free from unreasonable searches and seizures both inside and outside the family home.
>
> Second, as the introductory illustration intimates, depending upon the child and the nature of the investigation, the process can cause emotional and psychological damage ranging from temporary

> discomfort to significant long-term harm.[2]

S.G., who was only nine, was removed from class, placed in a room with a social worker and deputy sheriff and interrogated for two hours regarding intimate details of her family life. *Greene v. Camreta*, 588 F.3d at 1017. She was facing difficult and traumatic circumstances that could cause long-term emotional and psychological damage. S.G. testified that she was scared when she was left alone with Petitioners. *Id.* She had no less right to the love, comfort and reassurance of her mother than she would have if she were undergoing an invasive physical examination. Likewise, Sarah G. had a right to be present when her daughter was being subjected to a situation that could cause her emotional and psychological harm. Sarah G. was not the subject of Petitioners' investigation and therefore should not have been deprived of her right to provide care and comfort to her children.

---

[2] Dorianne Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM & MARY L. REV. 413, 418-419 (2005).

Undoubtedly, child abuse and neglect are serious problems and protecting the victims of such abuse is an important goal. *Rogers*, 487 F.3d at 1297. "However, the rights of families to be free from governmental interference and arbitrary state action are also important." *Id.* "Thus, we must balance, on the one hand, the need to protect children from abuse and neglect and, on the other, the preservation of the essential privacy and liberty interests that families are guaranteed under both the Fourth and Fourteenth Amendments of our Constitution." *Id.* That balancing requires that government authorities conform to the requirements of the Fourth Amendment before invading familial privacy, whether in the home or at the child's school. *See id.*[3]

B. Petitioners Should Not Be Permitted To Circumvent The Statutory Protections Congress Put In Place To Protect Families' Fourth Amendment Rights During Child Abuse Investigations.

Petitioners' decision to bypass the family residence and interrogate S.G. without notifying Sarah G. or obtaining her consent

---

[3] *See also,* Coleman, at 418-419.

also subverts protections Congress put in place to prevent just this kind of situation. The Keeping Children and Families Safe Act of 2003, S. 342, Pub. L. No. 108-36, 117 Stat. 800, added two subsections to 42 U.S.C. §5106a aimed at protecting the Fourth Amendment rights of parents and children during child abuse investigations. The subsections require that states enact:

> (xviii) provisions and procedures to require that a representative of the child protective services agency shall, at the initial time of contact with the individual subject to a child abuse and neglect investigation, advise the individual of the complaints or allegations made against the individual, in a manner that is consistent with laws protecting the rights of the informant;
>
> (xix) provisions addressing the training of representatives of the child protective services system regarding the legal duties of the representatives, which may consist of various methods of informing such representatives of such duties, in order to protect the legal rights

> and safety of children and families from the initial time of contact during investigation through treatment.

42 U.S.C. §§5106a (xviii), (xix). Congress explained that it enacted those provisions precisely to help protect people like Respondents who were being subjected to warrant-less searches and seizures during child abuse investigations:

> The committee has also included a requirement for training of CPS workers on their legal responsibilities in order to protect the constitutional and statutory rights of children and families.
>
> While the committee is strongly committed to the main mission of the child protective services system–to ensure that child safety and the best interests of the child are protected, the committee believes it is important for child protective services personnel to understand and respect fourth amendment limitations on their right to enter a home when investigating an allegation without a court order.

> The committee firmly believes that individuals being investigated for alleged child maltreatment should be informed of the specific allegations made against them. S. 342 addresses this issue by requiring States to have policies and procedures in place to require child protection workers, at the initial time of contact, to advise individuals who are subject to a child abuse and neglect investigation of the complaints or allegations made against them. The committee recognizes that it is a basic right for all citizens to be informed of what crime they are being accused of at the time they are being asked for an interview or entry into their home.

S. REP. NO. 108-12, at 15-16 (2003). Rather than according Respondents' Fourth Amendment rights the respect required by Congress, Petitioners side-stepped the issue by conducting the investigation at S.G.'s school instead of the family home. Petitioners should not be permitted to evade their obligations under the Fourth Amendment by simply changing the venue for their investigations. Respondents' Fourth Amendment rights are

not limited to the confines of their residence, and Petitioners should not be permitted to flout the will of this Court and Congress by doing at a child's school what they cannot do in the home. Fourth Amendment rights should not be subjected to such gamesmanship.

IV. GOVERNMENT AGENTS SHOULD BE REQUIRED TO PRESENT CLEAR AND CONVINCING EVIDENCE OF CAUSE FOR EMERGENCY REMOVAL BEFORE HAVING ACCESS TO CHILDREN WITHOUT NOTICE OR CONSENT OF THEIR PARENTS.

Petitioners' efforts to circumvent the requirements for in-home interrogations by seizing and interrogating S.G. at school demonstrate the need for stringent evidentiary standards for government investigations involving children. When, as is true in this case, a state investigation or proceeding threatens fundamental constitutional rights, the state should have to establish by clear and convincing evidence that there is a countervailing compelling interest that requires the extraordinary measures. *Santosky v. Kramer,* 455 U.S. 745, 756 (1982). "In cases involving individual rights, whether criminal or civil, '[t]he standard of proof [at a minimum] reflects the value society places on individual

liberty." *Id.* (citing *Addington v. Texas*, 441 U.S. 418, 425 (1979)). "This Court has mandated an intermediate standard of proof–'clear and convincing evidence'–when the individual interests at stake in a state proceeding are both 'particularly important' and 'more substantial than mere loss of money.'" *Id.* (citing *Addington*, 441 U.S. at 424)). "The Court has deemed this level of certainty necessary to preserve fundamental fairness in a variety of government-initiated proceedings that threaten the individual involved with 'a significant deprivation of liberty' or 'stigma.'" *Id.* (citing *Addington*, 441 U.S. at 425)).

In the parental rights context, a "clear and convincing evidence" standard of proof strikes a fair balance between the rights of the natural parents and the State's legitimate concerns. *Id.* at 769. "We hold that such a standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process." *Id.* There was no such balancing of rights in this case. Instead, Petitioners unilaterally elevated their interest in an intrusive, unobstructed interrogation of a nine-year old over the constitutional rights of the child and her mother to gain access to the child based on no more than a double hearsay

suggestion that there might have been some conduct that might indicate abuse. *Greene v. Camreta*, 588 F.3d at 1016-1017. Petitioners' conduct does not reflect the pre-eminent value placed upon individual liberty or the fundamental fairness that this Court found imperative in *Santosky*. This Court should re-emphasize that government agents cannot gain access to children for such investigations without meeting the clear and convincing evidence standard described in *Santosky*, 455 U.S. at 769.

Proceeding, as Petitioners did here, without meeting such standards, obtaining a warrant or consent or adducing proof of exigent circumstances "reflects an unacceptable bias against individual and family privacy."[4] "When all of the relevant interests are carefully evaluated–notwithstanding the almost religious sense of many child advocates to the contrary–there is a strong child-friendly case to be made for requiring valid consent, a real exigency, or a particularized warrant and probable cause before a state conducts a child maltreatment investigation that involves either a home visit or a sequestration and oral or physical examination of a child."[5] "These

---

[4] *Id.* at 509.

[5] *Id.* at 532.

traditional procedures best balance the various private interests and public needs at issue in the child welfare context, by assuring that the state can conduct a properly circumscribed investigation when it has proved to a neutral evaluator that a child is probably at risk."[6] Such requirements also preserve the presumption of innocent until proven guilty from the kind of reversal apparent in this case, where Petitioners conducted their investigation under the premise that the father *and mother* were presumed guilty.

Adhering to the traditional Fourth Amendment protections and evidentiary standard described in *Santosky* also protects the children's constitutional rights. "This approach uniquely respects the child's own Fourth Amendment interest in privacy, dignity, personal security, and mobility, by recognizing that, in general, the vitality of these values is intimately and even inextricably linked to the child's sense that she is one with her family. At the same time, it allows for the reality that this unity is sometimes broken from within by abusive or neglectful parents, giving rise to the need for the state to intrude into the circle of

---

6 *Id.*

family privacy when a child likely needs to be rescued."[7]

That circle should not be as easily penetrable as it was in this case. "[P]rivacy is essential to securing parental authority and the unity of the family group, and to the sense of dignity and personal security of its individual members especially the children."[8] "The law cannot realign the children's interests away from their parents on the basis of a mere subjective suspicion of maltreatment and also be true to the children's developmental needs or their Fourth Amendment rights."[9] "The fact is, most parents are their children's first, best caretakers, and thus the time-honored presumption that parents act in their best interests is both deserved and necessary to the children's wellbeing."[10]

Of course, "the sovereignty of the family cannot be so impenetrable that it prevents the state from saving children who are at real risk of maltreatment. At the same time, it cannot be so porous as to allow the state to storm the castle to 'save' children who do not need

---

7 *Id.* at 532-533.

8 *Id.* at 536.

9 Id. at 536-537.

10 *Id.*

saving."[11] "From the children's perspective, only a compromise conception that reflects appropriate respect for family privacy is just and healthy. The Fourth Amendment's traditional requirements precisely ensconce this conception."[12] This Court should clarify that those requirements must apply to child abuse investigations, whether interrogations take place in the home, at school or at some other location.

CONCLUSION

Government agents investigating potential child abuse within the family should not be permitted to circumvent Fourth Amendment protections by interrogating a nine-year-old at her school without her parent's knowledge or consent. Even if one parent is the subject of the investigation, the rights of the other parent and the child must be respected and protected. This Court should re-emphasize the fundamental importance of family privacy, integrity and the Fourth Amendment by clarifying that the protections accorded to

---

11 *Id.* at 537.

12 *Id.*

families in their homes must extend to investigations conducted away from home.

January 31, 2011.

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
LIBERTY COUNSEL
1055 Maitland Center Commons, 2d Flr.
Maitland, FL 32751
(800) 671-1776
Email: court@lc.org
Attorneys for Amicus

Stephen M. Crampton
Mary E. McAlister
LIBERTY COUNSEL
PO Box 11108
Lynchburg, VA 24506
(434) 592-7000
Email: court@lc.org
Attorneys for Amicus

15

No. 09-1478

Supreme Court, U.S.
FILED
DEC 29 2010
OFFICE OF THE CLERK

In The
SUPREME COURT OF THE UNITED STATES

JAMES ALFORD, Deputy Sheriff,
Deschutes County, Oregon
Petitioner,

v.

SARAH GREENE, et al.
Respondent.

AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER, JAMES ALFORD, DEPUTY SHERIFF, DESCHUTES COUNTY, OREGON, BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY, THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AND THE ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

STEVE COOLEY
District Attorney of Los Angeles County
IRENE T. WAKABAYASHI
Head Deputy, Appellate Division
PHYLLIS C. ASAYAMA
Assistant Head Deputy, Appellate Division
CASSANDRA HART *Counsel of Record*
Deputy District Attorney

Appellate Division
320 West Temple Street, Suite 540
Los Angeles, California 90012
Telephone: (213) 974-5911
Attorneys for Amici Curiae

40885
(23)

TABLE OF CONTENTS

	Pages
INTEREST OF AMICI CURIAE	4
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. THIS COURT MAY CONSIDER AN ISSUE NOT RAISED DIRECTLY BY THE PARTIES BUT RAISED IN AN AMICUS BRIEF	8
II.AN INTERVIEW OF A CHILD AT A PUBLIC SCHOOL REGARDING SUSPECTEDABUSE IS NOT A "SEIZURE" PER SE UNDER THE FOURTH ADMENDMENT BECAUSE OBJECTIVELY WHEN A POLICE OFFICER QUESTIONS A CHILD WHO IS A SUSPECTED *VICTIM*, NOT A SUSPECT HERSELF, THERE IS NOTHING WHICH AUTOMATICALLY CONVEYS THAT THE CHILD IS NOT FREE TO LEAVE OR MOVE OR IGNORE THE QUESTIONS	9
CONCLUSION	19

TABLE OF AUTHORITIES

	Pages
CASES	
California v. Hodari D. 499 U.S. 621 (1991)	13
Florida v. Bostick 501 U.S. 429 (1991)	14
Florida v. Rodriguez 469 U.S. 1 (1984)	11
Florida v. Royer 460 U.S. 491 (1983)	11, 14
Greene v. Camreta 588 F.3d 1011 (9th Cir. 2009)	5, 15,16
INS v. Delgado 466 U.S. 210 (1984)	12
Michigan v. Chesternut 486 U.S. 567 (1988)	13, 14
Olmstead v. United States 277 U.S. 438 (1928)	17
Teague v. Lane 489 U.S. 288 (1989)	8
Terry v. Ohio 392 U.S. 1 (1968)	9
United States v. Mendenhall 446 U.S. 544 (1980)	10
Wyman v. James 400 U.S. 309 (1971)	17

STATUTORY AUTHORITY

California Penal Code

Section 11174.3 5

California Government Code

Section 26500 2

OTHER AUTHORITIES

Los Angeles County Charter section 25 2

The State of Child Abuse in Los Angeles County
By Inter-Agency Council on Child Abuse and Neglect
(ICAN) 4

Los Angeles County Child Abuse and Neglect
Protocol by Los Angeles County Inter-Agency
Council on Child Abuse and Neglect (ICAN) 5

RULES OF COURT

Supreme Court Rules

Rule 14(1) 8

Rule 37.2(a) 2

Rule 37.4 2

No. 09-1478

In The
SUPREME COURT OF THE UNITED STATES

JAMES ALFORD, Deputy Sheriff,
Deschutes County, Oregon,
Petitioner,

v.

SARAH GREEN, et al.
Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals for the Ninth Circuit

AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER, JAMES ALFORD, DEPUTY SHERIFF, DESCHUTES COUNTY, OREGON, BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY, THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION, THE NATIONAL DISTRICT ATTORNEYS ASSOCIATION, AND THE ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL

Amicus curiae, Steve Cooley, District Attorney for the County of Los Angeles, State of California, submits this brief for filing as the authorized law officer of the county, and on behalf of the California District

Attorneys Association, the National District Attorneys Association, and the Arizona Prosecuting Attorneys' Advisory Council[1], pursuant to Supreme Court Rules 37.2(a) and 37.4.[2]

---

1. None of these parties (the California District Attorneys Association, the National District Attorneys Association, or the Arizona Prosecuting Attorneys' Advisory Council) authored this brief either in whole or in part, and none of them made monetary contributions to fund the preparation or submission of this brief.

2. Los Angeles County Charter section 25 (1995) states:

> Each County officer, Board or Commission shall have the powers and perform the duties now or hereafter prescribed by general law, and by this charter as to such officer, Board of Commission.

(Footnote omitted.) It is provided in the California general law that:

> The district attorney is the general prosecutor, except as otherwise provided by law. The public prosecutor shall attend the courts, and within his or her discretion shall initiate and conduct on behalf of the people all prosecutions for the public offenses.

Cal. Gov't Code § 26500 (West 1998).

In addition, on November 10, 2010, counsel for both the Petitioner and the Respondent filed consents in this Court to the filing of amicus curiae briefs in support of either or neither party. *Supreme Court Docket* no. 09-1478.

The National District Attorneys Association (NDAA) is the largest and primary professional association of prosecuting attorneys in the United States. The association

(continued...)

(...continued)

has approximately 7,000 members, including most of the nation's local prosecutors; assistant prosecutors; investigators; victim witness advocates; and paralegals. The mission of the association is, "To be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people." NDAA provides professional guidance and support to its members, serves as a resource and education center, produces publications, and follows public policy issues involving criminal justice and law enforcement.

The California District Attorneys Association (CDAA), the statewide organization of California prosecutors, is a professional organization incorporated as a nonprofit public benefit corporation in 1974. CDAA has over 2,500 members, including elected and appointed district attorneys, the Attorney General of California, city attorneys principally engaged in the prosecution of criminal cases, and attorneys employed by these officials. The association presents prosecutor's views as amicus curiae in appellate cases when it concludes that the issues raised in such cases will significantly affect the administration of criminal justice.

The Arizona Prosecuting Attorneys' Advisory Council (APAAC) was created in 1973. Its primary mission is to provide education, training, and a variety of other services to prosecutors. It is composed of 22 members, including the state attorney general, the 15 elected county attorneys, four municipal prosecutors, a representative of the Arizona state supreme court, and the dean of the state's two law colleges.

INTEREST OF AMICI CURIAE

Amicus curiae, as the executive officer charged with the prosecution of crime in the most populous county in California, has a compelling interest in protecting children and ensuring their safety and in the prompt and effective investigation and prosecution of suspected child abuse.

Los Angeles County governmental agencies conduct a large number of child abuse and neglect investigations. *The State of Child Abuse in Los Angeles County*, prepared by the Los Angeles County's Inter-Agency Council on Child Abuse and Neglect (ICAN), reported the following data for 2008 among various county agencies.[3] The Department of Child and Family Services received 166,745 referrals of child abuse or neglect, including 52,242 referrals for sexual and physical abuse and severe neglect. ICAN Report at 161. Law enforcement agencies conducted over 35,000 investigations.[4] Prosecutors filed over 3,400 cases. *Id.* at 119, 283.[5]

---

3. Los Angeles County Inter-Agency Council on Child Abuse and Neglect, *The State of Child Abuse in Los Angeles County* (April 2010) <http://ican.co.la.ca.us/data_loads.htm (ICAN report).

4. The Los Angeles County Sheriff's Department had 3,170 cases reported by station. ICAN Report at 389. The Juvenile Division of the Los Angeles Police Department conducted 27,454 investigations (criminal and non-criminal). *Id* at 39. Other independent police agencies reported a total of 5,437 investigations. *Id* at 54-55.

5. These numbers reflect statistics supplied by the Office of the District Attorney and the Office of the Los Angeles

(continued...)

In Los Angeles County, coordination of child abuse investigations and interviews of child victims are encouraged.[6] A significant number of these investigations include interviews of suspected victims in their schools, particularly if the suspected abuser is a household member. California law specifically allows police investigators and government social workers who are investigating child abuse and neglect to conduct these interviews at school. Cal. Penal Code § 11174.3 (Deering 2010).

The Ninth Circuit held in *Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009), that a government official

---

(...continued)

City Attorney. The other nine city attorneys' offices in Los Angeles County that prosecute misdemeanor offenses did not report referral and filing statistics.

6. Los Angeles County Inter-Agency Council on Child Abuse and Neglect, *Los Angeles County Child Abuse and Neglect Protocol* (August 2009)<http://www.ican4kids.org/documents/LACounty_Child_Abuse_and_Neglect_Protocol.pdf> (ICAN Protocol). The ICAN Protocol serves as a guide to the recommended practices for the identification, reporting, investigation, case management and prosecution of child abuse and neglect cases, including a preference for coordinating efforts so that providers will "lessen emotional trauma to the victims occasioned by repeat interviews ... and other governmental interventions" and "promote inter-agency investigation and case management." ICAN Protocol at vii, 1. Specific recommendations include a multi-disciplinary approach and coordinated interviews. *Id* at 9, 34.

must have a warrant, court order, parental consent, or exigent circumstances before "seizing" a child at public school to conduct an interview regarding suspected abuse. The Ninth Circuit's per se holding that all public school interviews of children regarding suspected abuse are "seizures" within the meaning of the Fourth Amendment is a gross mischaracterization with very serious consequences. Requiring a warrant, court order, parental consent, or exigent circumstances before any child may be interviewed at school regarding suspected abuse, hampers the efforts of law enforcement officers and prosecutors to promptly and effectively investigate and prosecute child abuse and most importantly, hinders the performance of their duty to protect children and ensure their safety.

SUMMARY OF ARGUMENT

Clearly, not every encounter with a police officer triggers the Fourth Amendment. Generally, the Fourth Amendment is implemented only if the encounter could be described as a "seizure" or a "search." An encounter with the police that is not a seizure is described as a "consensual encounter." Such an encounter does not need to be justified under the Fourth Amendment. An objective or reasonable person test determines whether a seizure has occurred.

An interview of a child at a public school conducted to determine whether that child is a victim of child abuse or sexual molestation is not a seizure because when an officer questions a child about the child's possible victimization, there is nothing to suggest that the child would not be free to leave, free to move, or free to simply ignore the questions.

The fact that, in the interests of privacy, a child is moved from a classroom to a school office for the interview makes no difference: children are regularly directed to move from place to place at school, making the interview no more intrusive than the child's daily experience at school.

The fact that the officer involved is armed is also of no consequence: it is common knowledge that police officers carry weapons as part of their uniform; and it is not objectively reasonable for a crime victim to believe that a police officer would shoot her if she ignored questions regarding her victimization. Police officers do not shoot or otherwise harm child victims who fail to disclose information about crimes committed against them.

The fact that the interview lasts an hour, even two, is also insignificant: there is an art to interviewing crime victims, particularly child victims, which involves taking the time necessary to make the child at ease by starting with comfortable questions and to get to know the child before asking about the suspected abuse or molestation. These factors do not transform a consensual encounter into a seizure of the victim that implicate the Fourth Amendment.

The purpose of the interview, to protect children who are suspected victims of crime, rather than gather evidence to assist in their criminal prosecution, is also a significant factor. Questioning victims and witnesses to help solve and prevent crime is not the same as questioning a suspect to prosecute him for a crime. The constitutional rights of victims and witnesses are no less important than those of a suspected criminal. However, the fact that the purpose of a victim interview is to

benefit the victim is an important consideration in determining whether an encounter constitutes a seizure.

ARGUMENT

I. THIS COURT MAY CONSIDER AN ISSUE NOT RAISED DIRECTLY BY THE PARTIES BUT RAISED IN AN AMICUS BRIEF

In this case, the Ninth Circuit adopted, without providing any analysis whatsoever, the district court assumption that an in-school interview of a child victim regarding suspected abuse was a seizure. None of the parties have thus far directly addressed this issue.

In general, only those issues raised by the parties or fairly included in raised issues will be considered by the Supreme Court. Sup. Ct. R. 14(1)(a). However, this Court need not always strictly adhere to this rule. Indeed, this Court may consider an issue not raised directly by the parties but raised in an amicus brief. *See Teague v. Lane*, 489 U.S. 288, 300 (1989).

Accordingly, amici urge this Court to address the issue of whether an in-school interview of a child victim regarding suspected abuse is necessarily a seizure. Amici assert that the issue is fairly included, though not directly raised, in the issues stated by the parties. Moreover, even if this Court finds that the issue was not fairly included within those issues raised by the parties, it has been raised by an amici. *Teague*, 489 U.S. at 300.

II. AN INTERVIEW OF A CHILD AT A PUBLIC SCHOOL REGARDING SUSPECTED ABUSE IS NOT A "SEIZURE" PER SE UNDER THE FOURTH AMENDMENT BECAUSE OBJECTIVELY WHEN A POLICE OFFICER QUESTIONS A CHILD WHO IS A SUSPECTED *VICTIM*, NOT A SUSPECT HERSELF, THERE IS NOTHING WHICH AUTOMATICALLY CONVEYS THAT THE CHILD IS NOT FREE TO LEAVE OR MOVE OR IGNORE THE QUESTIONS

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. Const. amend. IV.

This Court has examined, in various contexts ranging from the city street, to airports, to the workplace, to buses, and to the country's borders, the question of whether police questioning amounts to a "seizure" prohibited by the Fourth Amendment. In a long line of cases, beginning with *Terry v. Ohio*, 392 U.S. 1 (1968), this Court has held repeatedly that police questioning itself is not a seizure and that for a seizure to reach constitutional magnitude, a restraint of liberty must be involved.

In *Terry*, Officer McFadden observed three men engaging in conduct which appeared to him, on the basis of his training and experience, to be the "casing" of a store for a likely robbery. *Terry*, 392 U.S. at 7. He

approached the men, identified himself, asked for their names, and failed to receive a prompt response, except from Terry who mumbled something. *Ibid.* Officer McFadden grabbed Terry and patted down the exterior of his clothing, recovering a gun. *Ibid.* Chief Justice Warren stated that the Fourth Amendment was applicable "whenever a police officer accosts an individual and restrains his freedom to walk away." *Id.* at p. 16. However, this Court also went on to hold that a police officer may walk up to anyone on the street and ask a question without running afoul of the Fourth Amendment. *Terry*, 392 U.S. at 22-23. "Not all personal intercourse between policemen and citizens involves 'seizures' of persons and only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Id.* at 19, fn.16. Thus, *Terry* essentially recognized two ways in which an officer may seize a person: by physical force or by show of authority (so called "mental" detention). Either way, based upon *Terry*, a restraint on liberty was necessary in order to find a seizure implicating the Fourth Amendment.

Twelve years later, Justice Stewart, in *United States v. Mendenhall*, 446 U.S. 544 (1980), first proposed a reasonable standard: that a person has been seized "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Mendenhall* held that no seizure had occurred when police agents approached respondent on a public concourse of an airport, asked her if she would show them her ticket and identification, and posed a few questions to her. *Id.* at 555. Justice Stewart listed four

circumstances "that might indicate a seizure even where the person did not attempt to leave: the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officers' request might be compelled." *Id.* at 554. Justice Stewart stated that, in the absence of some such evidence, as in *Mendenhall*, otherwise inoffensive contact between a member of the public and the police, cannot, as a matter of law, amount to a seizure of that person. *Id.* at 555.

Following *Mendenhall*, *Florida v. Royer*, 460 U.S. 491 (1983) (plurality opinion), held that respondent, a nervous young man who paid cash for an airline ticket from Miami to New York under an assumed name and carried heavy suitcases, could be stopped by police and temporarily detained while the police investigated whether he was a drug courier. *Id.* at 494. A seizure occurred only once the officers had asked him to accompany them to a small room, retained his ticket and identification, and indicated that he was not free to leave. *Id.* at 504. However, in so holding, this Court still recognized that mere police questioning does not constitute a seizure, explaining that "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if he is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answer to such questions." *Ibid.*

Florida v. Rodriguez, 469 U.S. 1, 4-6 (1984) (per curiam), held that an officer asking respondent in an airport lobby if they might talk and suggesting that they

move 15 feet away in order to talk, was not conduct that rose to the level of a seizure. This was "the sort of consensual encounter that implicate[d] no Fourth Amendment interests." *Ibid.*

No seizure occurred when INS agents seeking to identify illegal aliens conducted work force surveys inside a garment factory; while some agents were positioned at exits, others systematically moved through the factory and questioned employees. *INS v. Delgado*, 466 U.S. 210, 220-221 (1984). This Court specifically rejected the argument that the blocked exits turned the incident into a seizure, stating instead that since respondents were free to go about their own business in the workplace after a question was put to them, respondents were not in fact detained. *Id.* at 220. The majority, in an opinion written by Justice Rehnquist, reasoned that "ordinarily when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by [their] voluntary obligations to their employers. *Id.* at 218. Although some disruption was caused, including the efforts of some workers to hide, workers were not prevented from moving about the factory. *Id.* The stationing of agents by the doors did not change the result because the purpose was to insure that all persons were questioned: "If mere questioning does not constitute a seizure when it occurs inside the factory, it is no more a seizure when it occurs at the exits." *Id.* at 218, (footnote omitted.) Since most workers could have no reasonable fear that they would be detained upon leaving, no seizure of the work force as a whole occurred. *Id.* at 219. This Court also reasoned as follows:

> While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response. Unless circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment. But if the person refuses to answer and the police take additional steps . . . to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure.

Id. at 216-217.

In *Michigan v. Chesternut*, 486 U.S. 567, 575 (1988), no seizure occurred when police officers in a squad car drove alongside a suspect who turned and ran down the sidewalk when he saw the squad car approach. Under the circumstances (no siren, flashing lights, displaying of a weapon, or blocking of the suspect's path), the police conduct "would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon his freedom of movement." *Ibid.* (footnote omitted.) To be a seizure, more was needed: "The record does not reflect that the police activated a siren or flashers; . . . or that they operated the car in an aggressive manner to block respondent's course or otherwise control the direction or speed of his movement." *Ibid.*

In *California v. Hodari D.*, 499 U.S. 621, 629 (1991), this Court held that even an actual chase did not amount to a seizure because the suspect failed to comply

with the officer's order to stop. A Fourth Amendment "seizure" of a person is the same as a common law arrest and there must be either application of physical force (or the laying on of hands) or submission to the assertion of authority in order to constitute a seizure. *Id.* at 626, fn. 2.

In *Florida v. Bostick*, 501 U.S. 429, 431-432 (1991), police officers, conducting a "bus sweep" aimed at detecting illegal drugs and their couriers, boarded a bus to inspect tickets and identification of selected passengers. This Court began its analysis with the observation that since *Terry*, it had repeatedly held that mere police questioning was not a seizure. *Id.* at 434. The fact that Bostick did not feel free to leave the bus did not mean that the police had seized him. He was a passenger on a bus that was soon to depart, such that his movements were "confined" regardless of the conduct of the police officers. *Id.* at 435-436. This case was "analytically indistinguishable from *Delgado*. Like the workers in that case [subjected to the INS "survey" at their workplace], Bostick's freedom of movement was restricted by a factor independent of police conduct – i.e, by his being a passenger on a bus." *Id.* at 436. Accordingly, the appropriate inquiry in determining whether a seizure had occurred was "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." *Id.*

Activating flashing lights on a patrol car has been held to be a seizure. *Michigan v. Chesternut*, 486 U.S. at 575. However, only in *Florida v. Royer* did a majority hold that a seizure occurred short of a physical restraint, and the facts of that case significantly resembled a physical seizure: by retaining Royer's

driver's license, airline ticket, and luggage, the police essentially controlled his ability to travel. *Id.* at 494.

The Ninth Circuit opinion fails to consider the principle that mere police questioning is not a seizure because a seizure involves physical or mental restraint or termination of movement. An interview of a child at a public school by a police officer regarding suspected child abuse, which does not involve any restraint, physical or otherwise, is not a seizure and all such interviews do not violate the Fourth Amendment. Simply stated, a seizure did not occur in the case.

As in this case, the fact that a child is moved from the classroom to another room at the school in order to conduct an interview, does not turn the encounter into a seizure. Like the workers in *Delgado* and the man on the bus in *Bostick*, a child's freedom of movement is seriously impacted at school in ways that are independent of any kind of police conduct: on the one hand, a child must go where she is told regardless of police presence; on the other hand, irrespective of police presence, a child must stay where she is told. Consequently, the fact that a child is moved from one room to another in order to effect an interview does not turn an in-school interview of a child into a seizure: the movement is no more restrictive or intrusive than an ordinary experience at school every day. In fact, moving the child to another room should be encouraged in order to protect her privacy.

The Ninth Circuit in this matter placed particular emphasis on the fact that the sheriff was armed. *Greene v. Camreta*, 588 F.3d at 1027-28. This fact does not turn an in-school interview of a child regarding suspected abuse into a seizure. When an adult suspect is detained on the streets by an armed police officer, the belief is not

unreasonable that if that person is uncooperative, he runs the risk of being shot. However, when a child, who is suspected not of having perpetrated a crime but of being the *victim* of a crime, sits down to be interviewed by a police officer, it is patently absurd to believe that if the child does not cooperate, the officer will shoot her. It is common knowledge that police officers carry firearms; children routinely see armed officers on television, guarding banks, guarding airports. A reasonable person would not believe that an officer would shoot her, a victim, for refusing to answer questions: indeed, the likeliest source of stress for a child in this type of scenario is the desire to still protect the abuser, particularly if that person is a family or household member. Moreover, in the matter *sub judice*, the child victim specifically stated that she was not particularly distressed by the sheriff's presence: she testified that she is generally comfortable around police officers, that Alford was nice to her and did not do anything to scare her, and that she trusted him. *Id.* at 1017.

The fact that nothing actually happens during an in-school interview to prevent a child from leaving is also a critical factor demonstrating that no seizure has occurred. In *Greene*, the child did not ask to call home, did not ask to have Friesen or her parents with her, and did not cry. *Greene*, 588 F.3d at 1017. She made no effort to leave. The sheriff never blocked her exit. Indeed, the record is devoid of any facts which objectively show that anything occurred to actually prevent the victim in *Greene* from leaving. There was no physical restraint whatsoever.

Another important factor is that a victim interview to investigate suspected child abuse only benefits the child. Questioning victims and witnesses to

help solve and prevent crime is not the same as questioning a suspect to prosecute him for a crime. In *Wyman v. James* (1971) 400 U.S. 309, 323, this Court held that home visits by welfare case workers did not implicate the Fourth Amendment because their primary objective was the welfare, not the prosecution, of the recipient. Amici do not suggest the establishment of a paternalistic plan whereby a complaining citizen's constitutional rights may be violated in the name of providing aid. Years ago, Justice Brandeis warned, "Experience should teach us to be most on guard to protect liberty when the Government's purposes are beneficient." *Olmstead v. United States* (1928) 277 U.S. 438, 479 (dissent). However, the purpose of in-school interviews of suspected child abuse victims is but one factor to be taken into consideration as a whole and the Fourth Amendment ought not to be used blindly as a sword in this very different context.

Finally, the length of an in school interview cannot be ignored. Amici recognize that the type of police questioning approved in *Terry* lasted only minutes. There is clearly a time continuum of a police detention, ranging from minutes to hours, for which a seizure under the Fourth Amendment still may not occur. The length of time is not determinative. Child interviews take time. They should not be rushed. Any experienced interviewer first spends time talking about more comfortable subject matters in order to both get to know the child and gain her trust. Viewed in that context, an hour, even two, does not turn the event into a seizure. An interview that keeps a child at school past the end of the regular school day may be problematic, and even then, not per se a seizure. But an interview conducted during the regular school day, even if

lengthy, is not a seizure. In this case *sub judice*, the interview lasted anywhere from one to two hours during which nothing unusual occurred. *Greene*, 588 F.3d at 1017.

The protections of the Fourth Amendment were intended to protect citizens against state officers who were raiding the homes of colonials in search of smuggled goods, not to prevent police officers from interviewing child victims of suspected abuse in order to help capture the suspect and protect the child. The Ninth Circuit accepted the notion that an interview of a child at school by a police officer is a seizure per se without any analysis. This acceptance was error: an interview of a child at a public school by a police officer regarding suspected child abuse, which does not involve any restraint, is not a seizure per se and does not amount to a seizure reaching constitutional proportions. No seizure occurred here.

CONCLUSION

For the foregoing reasons, this Court should find that the Ninth Circuit's bald acceptance of the notion that an interview of a child at school by a police officer is a seizure per se without analysis was error: an interview of a child at a public school by a police officer regarding suspected child abuse, which does not involve any restraint, is not a seizure and does not violate the Fourth Amendment. Moreover, this Court should find that no seizure occurred in this case.

Respectfully submitted,

STEVE COOLEY
District Attorney of
Los Angeles County

By Irene Wakabayashi

IRENE WAKABAYASHI, SBN 132848
Head Deputy

Phyllis C. Asayama

PHYLLIS C. ASAYAMA, SBN 88919
Assistant Head Deputy

Cassandra Hart /PCA

CASSANDRA HART, SBN 147067
Deputy District Attorney
Counsel of Record

Attorneys for Amici Curiae in Support of
Petitioner James Alford

Consolidated Nos. 09-1454, 09-1478

In the Supreme Court of the United States

BOB CAMRETA, *Petitioner*,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor, *Respondent*.

JAMES ALFORD,
Deschutes County Deputy Sheriff, *Petitioner*,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor, *Respondent*.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE LOYOLA *CIVITAS* CHILDLAW CENTER, NATIONAL CENTER FOR YOUTH LAW, CLINICAL SOCIAL WORK ASSOCIATION, SOUTHERN POVERTY LAW CENTER, LAWYERS FOR CHILDREN, CHILDREN AND FAMILY JUSTICE CENTER, CHILDREN'S ADVOCACY CLINIC, PROF. MICHAEL S. WALD, PROF. DONALD N. DUQUETTE *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

BRUCE A. BOYER, *Counsel of Record*
MIRANDA B. JOHNSON
CIVITAS CHILDLAW CENTER
LOYOLA UNIVERSITY CHICAGO SCHOOL OF LAW
25 East Pearson Street, Suite 1100
Chicago, Illinois 60611
(312) 915-7940
bboyer@luc.edu
Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

IDENTITY OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 3

ARGUMENT 5

I. The Interrogation of S.G. Was a Seizure under the Fourth Amendment 5

II. In Evaluating Whether the Warrantless Seizure of a Child Was Constitutional, the Court Must Weigh the Purpose of the Seizure against Both Its Effectiveness in Advancing the State's Protective Goals and the Nature of the Individual Interests Affected 6

III. Warrantless and Excessive Interrogation of a Child in School about Alleged Familial Sex Abuse, in the Presence of an Armed and Uniformed Police Officer, Is Harmful to the Child and Does Not Advance an Important State Purpose 10

A. Ineffective Practices in the Investigation of Sex Abuse Are Harmful to Children and Impede the Successful Prosecution of Perpetrators of Abuse and Protection of Child Victims 10

B. Children are Protected by Child-Centered Practices That Encourage the Accurate and Reliable Identification of Victims of Abuse and Protect Child Victims from Further Trauma... 16

1. Interviews Should Be Conducted by Appropriate, Trained Personnel 19

2. Interviews Should Be Conducted in Neutral, Non-Intimidating Settings..... 21

3. Interviews Should Avoid Leading, Directive, or Suggestive Tactics..... 23

C. Viewed in its Entirety, the Seizure of S.G. Was Conducted in a Manner That Was Harmful to Her, Failed to Advance Any Important State Goal, and Violated Her Rights Under the Fourth Amendment..... 24

IV. The State's Interest in Protecting Children from Abuse Must Be Balanced with the Child's Right to Be Free from Unwarranted Intrusion and Interference with Her Family Relationships..... 32

CONCLUSION..... 39

APPENDIX A.....A1

TABLE OF CITED AUTHORITIES

SUPREME COURT CASES

Breed v. Jones, 421 U.S. 519 (1975) 37

Brendlin v. California, 551 U.S. 249 (2007) 5

Brown v. Texas, 443 U.S. 47 (1979) 7

Camara v. Municipal Court, 387 U.S. 523 (1967) 5, 6

Ferguson v. City of Charleston, 532 U.S. 67 (2001) 30

Goss v. Lopez, 419 U.S. 565 (1975) 37

Graham v. Florida, 130 S. Ct. 2011 (2010) 37

Griswold v. Connecticut, 381 U.S. 479 (1965) 34

Haley v. Ohio, 332 U.S. 596 (1948) 37

Hodgson v. Minnesota, 497 U.S. 417 (1990) 34

Illinois v. Lidster, 540 U.S. 419 (2004) ..... passim

In re Gault, 387 U.S. 1 (1967) 37

Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981). 29

Maryland v. Craig, 497 U.S. 836 (1990) 8, 11

Meyer v. Nebraska, 262 U.S. 390 (1923) 33

Michael H. v. Gerald D., 491 U.S. 110 (1989) 35

Michigan v. Fisher, 130 S.Ct. 546 (2009) 6

Moore v. City of East Cleveland, 431 U.S. 494 (1977). 33, 34

New Jersey v. T.L.O., 469 U.S. 325 (1985) 6, 7

Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) 35

Prince v. Massachusetts, 321 U.S. 158 (1944) ... 34, 35

Roper v. Simmons, 543 U.S. 551 (2005) 37

Safford Unified School Dist. No. 1 v. Redding, 129 S. Ct. 2633 (2009) 37

Santosky v. Kramer, 455 U.S. 745 (1982) 7, 34, 35

Schall v. Martin, 467 U.S. 253 (1984) 7

Skinner v. Oklahoma, 316 U.S. 535 (1942) 33

Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602 (1989) 7

Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816 (1977) 33

Stanley v. Illinois, 405 U.S. 645 (1972) 32

Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969) 37

Trimble v. Gordon, 430 U.S. 762 (1977) 33

Troxel v. Granville, 530 U.S. 57 (2000) 34

Wisconsin v. Yoder, 406 U.S. 205 (1972) 33

OTHER FEDERAL CASES

Doe v. Heck, 327 F.3d 492 (7th Cir. 2003)..... 5, 33, 36

Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977) 36

Franz v. United States, 707 F.2d 582 (D.C. Cir. 1983) 36

Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009) .....passim

J.B. v. Washington Cnty., 127 F.3d 919 (10th Cir. 1997)..... 36

Jones v. Hunt, 410 F.3d 1221 (10th Cir. 2005) 5

Lehman v. Lycoming Cnty. Children's Svcs. Agency, 648 F.2d 135 (3d Cir. 1981)..... 36

Smith v. City of Fontana, 818 F.2d 1411 (9th Cir. 1987)..... 36

Tenenbaum v. Williams, 193 F.3d 581 (2d Cir. 1999) 30

Wallis v. Spencer, 202 F.3d 1126 (9th Cir. 1999).... 36

Wooley v. City of Baton Rouge, 211 F.3d 913 (5th Cir. 2000)..... 36

FEDERAL STATUTES

Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101 *et seq.* 16, 34

STATE STATUTES

325 Ill. Comp. Stat. 5/7.5 31

Fla. Stat. § 39.301(12) 31

N.Y. Fam. Ct. Act § 1034(2) 31

BOOKS

Alison R. Perona et al., *Research-Based Guidelines for Child Forensic Interviews, in* Ending Child Abuse (Victor Vieth et al. eds., 2004) 18, 24

Debra Ann Poole & Lawrence T. White, *Tell Me Again and Again: Stability and Change in the Repeated Testimonies of Children and Adults, in* Memory and Testimony in the Child Witness (Maria S. Zaragoza et al. eds., 1995) 13, 23

Debra Whitcomb, U.S. Dep't of Justice, *When the Victim Is a Child* (1992) 14

Fred E. Inbau et al., *Criminal Interrogation and Confessions* (4th ed. 2001) 20

Joseph Goldstein, Anna Freud & Albert J. Solnit, *Before the Best Interests of the Child* (1979) 15

Office of Juv. Justice & Delinquency Prev., U.S. Dep't of Justice, *The Child Victim as a Witness* (1994) 12

Sherrie Bourg Carter, Nat'l Inst. for Trial Advocacy, *Children in the Courtroom* (2d ed. 2009). 11, 15, 26

Stephen J. Ceci & Maggie Bruck, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony* (1995) 13

Tom Plach, *Investigating Allegations of Child and Adolescent Sexual Abuse* (2008) 12, 20, 21

Vera Fahlberg, *A Child's Journey Through Placement* (1991)..... 14, 28, 29

JOURNALS AND PERIODICALS

Amy Russell, *Electronic Recordings of Child Investigative Interviews*, Centerpiece (Nat'l Child Prot. Training Ctr., St. Paul, Minn.), June 2009 25

Catherine Dixon, *Best Practices in the Response to Child Abuse*, 25 Miss. C. L. Rev. 73 (2005) ... 18, 21

Comm. on Early Childhood, Adoption, & Dependent Care, Am. Acad. of Pediatrics, *Health Care of Young Children in Foster Care*, 109 Pediatrics 539 (2002) 15

Doriane L. Coleman, *Storming the Castle to Save the Children*, 47 Wm. & Mary L. Rev. 413 (2005). 6, 30

Gail S. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, 57 Monographs Soc'y Res. Child Dev. 1 (1992) 12, 15, 28

Hollida Wakefield, *Guidelines on Investigatory Interviewing of Children: What is the Consensus in the Scientific Community?*, 24 Am. J. Forensic Psych., no. 3, 2006, *available at* http://www.ipt-forensics.com/library/ajfp1.htm.... ..... 13, 23, 24, 25

Jerome R. Kolbo & Edith Strong, *Multidisciplinary Team Approaches to the Investigation and Resolution of Child Abuse and Neglect: A National Survey*, 2 Child Maltreatment 61 (1997)..... 12, 19

John N. Briere & Diana M. Eliot, *Immediate and Long-Term Impacts of Child Sexual Abuse*, Future of Children, Sum.–Fall 1994 10

June M. Clausen et al., *Mental Health Problems of Children in Foster Care*, 7 J. Child & Fam. Stud. 283 (1998) 14

Lindsay E. Cronch et al., *Forensic Interviewing in Child Sex Abuse Cases: Current Techniques and Future Directions*, 11 Aggression & Violent Behav. 195 (2006), *available at* http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1005&context=psychfacpub... 11, 13, 21, 22

Maggie Bruck et al., *External and Internal Sources of Variation in the Creation of False Reports in Children*, 9 Learning & Individual Differences 289 (1997) 24

Mark Hardin, *Legal Barriers in Child Abuse Investigations: State Powers and Individual Rights*, 63 Wash L. Rev. 493 (1988) 21

Paula Wolfteich & Brittany Loggins, *Evaluation of the Children's Advocacy Center Model*, 24 Child & Adolescent Soc. Work J. 333 (2007) 22

Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 Cornell L. Rev. 33 (2000) 8, 13, 23

Theodore P. Cross et al., *Child Forensic Interviewing in Children's Advocacy Centers: Empirical Data on a Practice Model*, 31 Child Abuse & Neglect 1031 (2007) 19, 22

MISCELLANEOUS

Am. Acad. of Child & Adolescent Psychiatry, *Practice Parameters for the Forensic Evaluation of Children and Adolescents Who May Have Been Physically or Sexually Abused*, 36 J. Am. Acad. Child & Adolescent Psych. Supp. 37S, 48S (Oct. 1997), *available at* http://www.aacap.org/galleries/PracticeParameters/JAACAP%20Forensic%201997.pdf..... 21, 24

Am. Bar Ass'n, *Report on Child Victims of Crime Resolution*, Res. 101D (Feb. 16, 2009), *available at* http://www.abanet.org/domviol/ABA_Policies/134_1_3.pdf..... 18

Am. Prof'l Soc'y on the Abuse of Children, *Practice Guidelines: Investigative Interviewing in Cases of Alleged Child Abuse* (2002) 20, 21

E-mail from Cori Plotkin, Pub. Relations Consultant, Nat'l Children's Alliance, to author (Nov. 23, 2010, 11:55 CST) (on file with author) 17

Gov.'s Task Force on Children's Justice & Dep't of Human Servs., State of Mich., *Forensic Interviewing Protocol* (2003), *available at* http://www.michigan.gov/documents/dhs/DHS-PUB-0779_211637_7.pdf. 20, 22

Nat'l Children's Alliance, *Putting Standards into Practice: A Guide to Implementing NCA Standards for Children's Advocacy Centers* 1 (2d ed. 2004) 18, 21, 24

Nat'l Children's Alliance, *Standards for Accredited Members* (2008), *available at* http://www.nationalchildrensalliance.org/file.php/1571/Revised+Standards+for+Accredited+Members.pdf#xml=http://webinator.dvcotechnology.com/texis/search/pdfhi.txt?query=NCA+Standards+for+Accredited+Members&pr=np2cr_nca-online&prox=page&rorder=500&rprox=500&rdfreq=500&rwfreq=500&rlead=500&rdepth=0&sufs=0&order=r&cq=&rpp=10&id=4d376c6312b 17, 18, 22

Office for Victims of Crime, U.S. Dep't of Justice, *Attorney General Guidelines for Victim and Witness Assistance* 48 (May 2005), *available at* http://www.justice.gov/olp/pdf/ag_guidelines.pdf 17

Office for Victims of Crime, U.S. Dep't of Justice, *Breaking the Cycle of Violence: Recommendations to Improve the Criminal Justice Response to Child Victims and Witnesses* (June 1999), *available at* http://www.ojp.usdoj.gov/ovc/publications/factshts/monograph.htm 10

Task Force on Child Witnesses, Am. Bar Ass'n, *The Child Witness in Criminal Cases* (2003)..... 23

INTEREST OF *AMICI CURIAE*[1]

The organizations and individuals submitting this brief work with and on behalf of children involved with the child protection and foster care systems. They include academics, social workers, and practicing lawyers who represent children in individual child protection cases, impact litigation, and other related settings. Though they approach their work from different perspectives, *Amici* all believe that law and public policy both should place the interests of children at the heart of the resolution of any question addressing the manner in which the Fourth Amendment regulates the investigation of allegations of child abuse.

IDENTITY OF *AMICI CURIAE*

Amici are the *Civitas* ChildLaw Center of the Loyola University Chicago School of Law; the National Center for Youth Law; the Clinical Social Work Association; the Southern Poverty Law Center; Lawyers for Children (New York, New York); the Children and Family Justice Center of the Northwestern University School of Law; the Children's Advocacy Clinic of the Pennsylvania State University Dickinson School of Law; Professor

---

[1] Pursuant to Sup. Ct. R. 37.6, *Amici Curiae* certify that no counsel for a party to this action authored any part of this brief, nor did any person or entity, other than *Amici*, their members, or their counsel make a monetary contribution to fund the preparation or submission of this brief. Counsel of record for the parties to this action have consented to the filing of this brief.

Michael S. Wald; Professor Donald N. Duquette; Professor Erik S. Pitchal; and Professor Paul Bennett. Statements of interest for each of them follow this brief as Appendix A.

SUMMARY OF THE ARGUMENT

Amici urge this Court to affirm the judgment of the Ninth Circuit, concluding that Petitioner Camreta's two-hour interrogation of nine-year-old S.G., conducted at her school and in the presence of an armed, uniformed police officer, constituted an impermissible seizure in violation of the child's rights under the Fourth Amendment. Because of the interrogation's "extensive entanglement" with law enforcement and the coercive circumstances arising therefrom, the Ninth Circuit correctly determined that the interrogation amounted to an unconstitutional seizure under the Fourth Amendment.

At stake in this case are not only the harms to children that arise when they are abused but also the harms to children that follow from deeply flawed state-based interventions conducted with the professed goal of protecting children from abuse. These harms include both the immediate trauma of being subjected to ill-conceived and poorly-executed interrogations and the serious collateral harms to children that arise when unreliable information procured through bad forensic practices prompts unwarranted or unsustainable interventions, including the highly disruptive placement of a child into foster care.

All these harms must be considered in evaluating the constitutionality of the seizure at issue here. Fourth Amendment jurisprudence dictates that this Court consider not only the gravity of the state's interest in protecting children from abuse but also the degree to which the seizure actually advances the state's goals and the interests

of the individual impacted by the seizure. Ineffective forensic practices in the investigation of sex abuse such as those used here, however well-intentioned, are harmful to children both in and of themselves, and because they impede the successful prosecution of perpetrators of abuse. The serious adverse consequences to children that follow when interviewers fail to follow minimum established standards relate directly to the relaxation of constitutional limits on the forced interrogation of children, thereby diminishing the weight of the state's protective interests. Moreover, a full Fourth Amendment analysis of the issues presented here compels this Court to consider not only S.G.'s right to be free from unreasonable seizures but also her right under the Fourteenth Amendment—reciprocal to that of her parents—to be free from state actions that interfere with the integrity of her family relationships without adequate cause. These concerns dictate that the seizure of S.G. should not be afforded constitutional protection. Should this Court reach the merits of Petitioners' Fourth Amendment claim, *Amici* urge this Court to affirm the conclusion of the Ninth Circuit that the seizure at issue here was unconstitutional.

ARGUMENT

I. THE INTERROGATION OF S.G. WAS A SEIZURE UNDER THE FOURTH AMENDMENT

The essential purpose of the Fourth Amendment, "as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967). In general, the Fourth Amendment applies to any situation in which a government authority seeks to question a person in circumstances where "a reasonable person would have believed he was not free to leave." *Brendlin v. California*, 551 U.S. 249, 255 (2007). Where the person being examined is a child, the analysis must account for the child's age, circumstances, and perspective. *See Jones v. Hunt*, 410 F.3d 1221, 1226 (10th Cir. 2005); *Doe v. Heck*, 327 F.3d 492, 510 (7th Cir. 2003).

The child at the center of this case was a developmentally-disabled, nine-year-old fourth-grader with a communications disorder. J.A. at 15, 42. She was taken from her school classroom and questioned for up to two hours by a persistent investigator who aggressively sought confirmation that she had been sexually abused by her father. J.A. at 71-72. The only other adult present during this deeply personal and uncomfortable interrogation was an armed, uniformed deputy sheriff. J.A. at 70–71. Though the interrogation was conducted in school, its purpose was wholly unrelated to any

school function. No evidence suggests that this disabled child—confined to a room in a facility where it was the norm for students to follow adult instruction—felt free to leave until released by her examiner. Like the parties and the lower courts, *Amici* assume that under these circumstances, where the child was effectively captive and the protective function was inextricably intertwined with a law enforcement presence and purpose, the interrogation of S.G. was a seizure governed by the Fourth Amendment. *See* Doriane L. Coleman, *Storming the Castle to Save the Children*, 47 Wm. & Mary L. Rev. 413, 469–70, nn.169–70 (2005) (collecting cases applying Fourth Amendment to child protection investigations).

II. IN EVALUATING WHETHER THE WARRANTLESS SEIZURE OF A CHILD WAS CONSTITUTIONAL, THE COURT MUST WEIGH THE PURPOSE OF THE SEIZURE AGAINST BOTH ITS EFFECTIVENESS IN ADVANCING THE STATE'S PROTECTIVE GOALS AND THE NATURE OF THE INDIVIDUAL INTERESTS AFFECTED

The touchstone in judging claims under the Fourth Amendment is reasonableness, *Michigan v. Fisher*, 130 S.Ct. 546, 548 (2009), and "the determination of the standard of reasonableness governing any specific class of search or seizure requires 'balancing the need to search against the invasion which the search entails,'" *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985) (quoting *Camara*, 387 U.S. at 536–537). This balancing must consider

three principal issues: (1) the gravity of the state's need for effective methods to deal with breaches of the public order, (2) the interests of the individual in safeguarding legitimate expectations of privacy and personal security, and (3) the degree to which the seizure advances the public interest. *Illinois v. Lidster*, 540 U.S. 419, 427 (2004) (citing *Brown v. Texas*, 443 U.S. 47, 51 (1979)).[2]

There can be no question of the importance of the government interest served by the investigation of reported child abuse and by the questioning of young children who are suspected victims of such abuse. This interest derives from the state's long-established obligation as *parens patriae* to protect its citizens, *see Schall v. Martin*, 467 U.S. 253, 265 (1984) (citing *Santosky v. Kramer*, 455 U.S. 745, 766 (1982)), and it amply justifies a range of systems designed to protect children from harm, provided those interventions are supported by an individualized or case-specific finding of necessity, *Maryland v. Craig*, 497 U.S. 836, 855 (1990). As

---

[2] *Amici* read *T.L.O.* and its progeny as requiring consideration of each of these factors whenever a question is raised about the reasonableness of a category of searches under the Fourth Amendment. *See T.L.O.*, 469 U.S. at 337, 340–41. However, to the extent that this Court's jurisprudence commands a sequenced consideration that examines whether the state has established a "special need" prior to engaging in the kind of balancing described in *T.L.O.*, *see, e.g., Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 619 (1989) ("When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context."), *Amici* take no position as to whether or not such a special need is presented by the facts of this case.

organizations and individuals committed to the protection of vulnerable and at-risk children, *Amici* acknowledge and fully endorse the importance of the state interest in identifying and redressing child abuse. However, as this Court has made plain, recognition of an important state purpose begins, rather than ends, the inquiry into whether a warrantless seizure violates the Fourth Amendment. *See Lidster*, 540 U.S. at 426.

Even where a seizure relates to a significant state interest, the Court must still consider the effectiveness, appropriateness, and likely consequences of the chosen tactic before condoning a particular category of state activity. State officials charged with the responsibility of investigating suspected child abuse face an exceedingly difficult challenge of balancing competing risks. On the one hand, the state's failure to identify and redress child abuse leaves vulnerable children exposed to physical and emotional harms that have lifelong consequences. On the other hand, when ill-conceived interrogations lead to state-based interventions premised on an unreliable factual foundation, the harm imposed on children—through the interview process, the unnecessary disruption of their lives and families, and the potential exposure to continuing abuse—can be every bit as severe as child abuse itself. *See* Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 Cornell L. Rev. 33, 45 (2000) (emphasizing the importance of avoiding mistakes of any kind in the investigative process).

Petitioners and their supporting *Amici* have thoroughly explored both the harm to children victimized by abuse and related concerns about systems that might fail to fully identify and redress such abuse. But they have largely ignored equally weighty concerns about harm to children ensuing directly and indirectly from bad practices, including all of the harms attendant upon the state's failure to distinguish unfounded allegations from real abuse. These harms encompass not only the immediate trauma of being subjected to ill-conceived tactics such as those used in the interrogation of S.G. but also the serious collateral harms that arise when unreliable information procured through bad forensic practices prompts unwarranted or unsustainable interventions. Petitioners similarly have not addressed the full range of children's interests at stake when they are threatened with removal from their families, including interests in family integrity guarded by the Fourteenth Amendment. All of these harms and interests must be considered in any complete analysis of whether Camreta's two-hour interrogation of nine-year-old S.G., in a closed room and in the presence of an armed and uniformed officer responsible for the criminal investigation of allegations of sex abuse, was constitutional.

III. WARRANTLESS AND EXCESSIVE INTERROGATION OF A CHILD IN SCHOOL ABOUT ALLEGED FAMILIAL SEX ABUSE, IN THE PRESENCE OF AN ARMED AND UNIFORMED POLICE OFFICER, IS HARMFUL TO THE CHILD AND DOES NOT ADVANCE AN IMPORTANT STATE PURPOSE

A. Ineffective Practices in the Investigation of Sex Abuse Are Harmful to Children and Impede the Successful Prosecution of Perpetrators of Abuse and Protection of Child Victims

The identification of children who have been victimized by abuse is undeniably a major public concern, given the well-documented and long-term adverse effects of child abuse. *See, e.g.*, Office for Victims of Crime, U.S. Dep't of Justice, *Breaking the Cycle of Violence: Recommendations to Improve the Criminal Justice Response to Child Victims and Witnesses* 3 (June 1999), *available at* http://www.ojp.usdoj.gov/ovc/publications/factshts/monograph.htm; John N. Briere & Diana M. Eliot, *Immediate and Long-Term Impacts of Child Sexual Abuse*, Future of Children, Sum.–Fall 1994, at 55.

Balanced against this concern, however, is the fact that children may also be severely harmed by poorly conducted investigations leading to inaccurate conclusions or unsubstantiated interventions:

> [b]ad interviewing can lead to serious consequences . . . includ[ing] eliciting false allegations, putting children and families through unnecessary stress,

> decreasing a child victim's credibility in court, contaminating facts, reducing probability of conviction, draining resources through unsuccessful trials and investigations, and reducing resources available for legitimate abuse cases.

Lindsay E. Cronch et al., *Forensic Interviewing in Child Sex Abuse Cases: Current Techniques and Future Directions*, 11 Aggression & Violent Behav. 195, 196 (2006), *available at* http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1005&context=psychfacpub. *See also* Sherrie Bourg Carter, Nat'l Inst. for Trial Advocacy, *Children in the Courtroom* 35 (2d ed. 2009) ("When conducted properly, interviews increase the likelihood of obtaining accurate reports from child witnesses, and thereby increase the likelihood that justice will be served. However, when conducted improperly, a host of injustices may occur, each equally as troubling and dangerous as the other."). Children questioned in coercive circumstances like those presented here are more likely to be traumatized by the process, more likely to be separated from their families without adequate cause, and more likely to be left exposed to ongoing abuse by the state's failure to generate reliable evidence from child witnesses.

First, the process itself by which state authorities seek to determine whether or not abuse has occurred can be highly traumatic to alleged child victims, regardless of whether they have actually been abused. *See Maryland v. Craig*, 497 U.S. 836, 855 (1990) (referencing the "growing body of academic literature documenting the psychological

trauma suffered by child abuse victims who must testify in court"); Jerome R. Kolbo & Edith Strong, *Multidisciplinary Team Approaches to the Investigation and Resolution of Child Abuse and Neglect: A National Survey*, 2 Child Maltreatment 61, 61 (1997) ("Harm to children occurs not only as a result of the maltreatment itself but also because of systematically insensitive procedures used to address reported maltreatment.").

One study of child victims of sexual abuse found that over half of the children who testified against their alleged abusers exhibited visible signs of distress. Gail S. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims*, 57 Monographs Soc'y Res. Child Dev. 1, 79, 88 (1992). Children in this study exhibited "substantial levels of disturbance" when their cases entered into the criminal justice system, and even months later the experience continued to have a negative impact on their behavior. *Id.* at 48, 51–53, 105. Other research suggests that this negative impact derives not so much from the experience of testifying in and of itself, as from "the *harshness* of the testimony experience." Office of Juv. Justice & Delinquency Prev., U.S. Dep't of Justice, *The Child Victim as a Witness* 131 (1994). These concerns thus arise whenever children are questioned closely by state officials about difficult and personal matters. *See* Tom Plach, *Investigating Allegations of Child and Adolescent Sexual Abuse* 72 (2008) ("the interview process can be potentially upsetting for the child or adolescent and can add additional stress and trauma for the victim.").

A second set of harms associated with bad forensic practices is that they may produce unreliable information leading not only to further traumatic testimonial experiences in ensuing court hearings but also to the unnecessary placement of children in foster care. There is widespread acknowledgment amongst social scientists that child witnesses generally are subject to suggestion and that interviewing techniques that fail to guard against this penchant increase the likelihood that children will provide inaccurate or false information in a forensic interview. *See, e.g.*, Cronch et al., *supra*, at 196–97; Ceci & Friedman, *supra*, at 43 ("[D]irected questioning . . . raises the problem of false positives."); Stephen J. Ceci & Maggie Bruck, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony* 107-25 (1995) (discussing problems inherent in multiple interviews of children); Debra Ann Poole & Lawrence T. White, *Tell Me Again and Again: Stability and Change in the Repeated Testimonies of Children and Adults*, *in* Memory and Testimony in the Child Witness 25 (Maria S. Zaragoza et al. eds., 1995) (observing that children subject to multiple interviews learn to answer questions based on what the interrogator expects); Hollida Wakefield, *Guidelines on Investigatory Interviewing of Children: What is the Consensus in the Scientific Community?*, 24 Am. J. Forensic Psych., no. 3, 2006 at 57, *available at* http://www.ipt-forensics.com/library/ajfp1.htm ("[A]lthough children are capable of providing accurate, reliable, and forensically useful information, they are vulnerable to suggestion.").

Children placed unnecessarily in foster care suffer substantial and avoidable harm from the disruption of family relationships. *See* Debra Whitcomb, U.S. Dep't of Justice, *When the Victim Is a Child* 21 (1992) ("the aftermath of disclosing child sexual abuse may be just as damaging to the victim as the abuse itself."). The experience of being placed into foster care can have significant adverse long-term consequences. *See* Vera Fahlberg, *A Child's Journey Through Placement* 166 (1991) (observing that children separated from their families and taken into interim care are prone to chronic fears and anxiety, including markedly higher incidences of a broad range of mental health and behavioral problems); June M. Clausen et al., *Mental Health Problems of Children in Foster Care*, 7 J. Child & Fam. Stud. 283, 284 (1998) ("[C]hildren in foster care are at heightened risk for mental health problems due to the negative effect of separation from their family.").

Even the brief separation of a parent and child following allegations of abuse can have profound negative repercussions on all family members. Goldstein, Freud and Solnit, authors of seminal treatises on the best interests of children, cautioned that:

> Children, on their part, react even to temporary infringement of parental autonomy with anxiety, diminishing trust, loosening of emotional ties, or an increasing tendency to be out of control. . . . When family integrity is broken or weakened by state intrusion, [the child's] needs are thwarted and his

> belief that his parents are omniscient and all-powerful is shaken prematurely.

Joseph Goldstein, Anna Freud & Albert J. Solnit, *Before the Best Interests of the Child* 9, 25 (1979). *See also* Comm. on Early Childhood, Adoption, & Dependent Care, Am. Acad. of Pediatrics, *Health Care of Young Children in Foster Care,* 109 Pediatrics 536, 539 (2002) ("Certainly, even brief separation from parental care is an unfortunate and usually traumatic event for children."); Goodman et al., *supra*, at 11 ("In stressful situations, part of children's distress may result from separation from supportive adults while at the same time being exposed to a strange, frightening environment.").

A third concern arises when bad practices are used to interrogate a child who has actually been victimized by abuse. Interrogations under such circumstances may result in evidence that is insufficiently reliable to sustain the interventions that follow, leaving children potentially exposed to continuing harm by a perpetrator. *See* Carter, *supra*, at 35 ("[B]adly conducted interviews with children who were truly abused . . . [cast] doubt on the reliability of the child's statement, thereby jeopardizing the likelihood of a conviction . . . and, in some cases, physical well-being of the child.").

To the extent that any interrogation encompassed by the Fourth Amendment exacerbates these harms, it impedes, rather than facilitates, the state's goal of protecting children. *Lidster*, 540 U.S. at 427. From the perspective of alleged child victims, constitutional doctrine and sound public policy thus both demand that the law seek to foster the use of effective and child-centered investigation techniques,

in order to maximize the prospect of reliable and constructive responses to allegations of child sexual abuse.

B. Children are Protected by Child-Centered Practices That Encourage the Accurate and Reliable Identification of Victims of Abuse and Protect Child Victims from Further Trauma

The reasonableness standard of *Lidster* demands that in light of the risks of harm to children associated with mistakes in the investigative process, state actors investigating allegations of child abuse rely, to the greatest extent possible, on established minimum standards regarding interviews with children. Over the past several decades, professionals focused on ensuring that interviews maximize reliability and minimize trauma have developed a substantial consensus on what constitutes good, child-centered forensic practice in the interviewing of suspected victims of child abuse. Federal law currently dictates the use of such standards. The Child Abuse and Prevention Treatment Act ("CAPTA") conditions federal funding for the prevention of child abuse on states' assurances that they will develop programs for the handling of such cases—particularly cases of child sexual abuse and exploitation—in a manner that limits "additional trauma to the child victim." 42 U.S.C. § 5106c(e)(1)(A). The United States Department of Justice, in guidelines adopted in 2005 following passage of the Crime Victims' Rights Act, also admonished that in the investigation and prosecution of a sex abuse, "[a] primary goal . . .

shall be to reduce the trauma to child victims and witnesses caused by their contact with the criminal justice system." Office for Victims of Crime, U.S. Dep't of Justice, *Attorney General Guidelines for Victim and Witness Assistance* 48 (May 2005), *available at* http://www.justice.gov/olp/pdf/ag_guidelines.pdf.

The principles reflected in CAPTA and the guidelines of the Attorney General are now mirrored across the professions that treat child victims. Accreditation standards produced by the National Children's Alliance ("NCA") [3] require member organizations to focus not only on fact gathering, but also on victim support and advocacy and the healing of child victims through therapeutic interventions. *See* Nat'l Children's Alliance, *Standards for Accredited Members* 14, 24 (2008) [hereinafter *NCA Standards*], *available at* http://www.nationalchildrensalliance.org/file.php/1571/Revised+Standards+for+Accredited+Members.pdf#xml=http://webinator.dvcotechnology.com/texis/search/pdfhi.txt?query=NCA+Standards+for+Accredited+Members&pr=np2cr_nca-online&prox=page&rorder=500&rprox=500&rdfreq=500&rwfreq=500&rlead=500&rdepth=0&sufs=0&order=r&cq=&rpp=10&id=4d376c6312b. The purpose of these standards is to help minimize trauma to

---

[3] The NCA is a membership organization dedicated to supporting best practices surrounding the investigation and response to severe child abuse. NCA accredits Children's Advocacy Centers ("CACs") around the country and currently has more than 700 member CACs, serving some 270,000 children annually. E-mail from Cori Plotkin, Pub. Relations Consultant, Nat'l Children's Alliance, to author (Nov. 23, 2010, 11:55 CST) (on file with author).

children, both in the investigative process and through subsequent interventions. *Id.* at 3, 14, 24. *See also* Nat'l Children's Alliance, *Putting Standards into Practice: A Guide to Implementing NCA Standards for Children's Advocacy Centers* 1 (2d ed. 2004) [hereinafter, *NCA Implementation Guide*] ("The primary goal of all [Children's Advocacy Centers] is to ensure that children are not further victimized by the intervention systems designed to protect them.") The NCA Standards have been recognized by scholars and practitioners alike as reflecting a national trend. *See, e.g.*, Am. Bar Ass'n, *Report on Child Victims of Crime Resolution*, Res. 101D (Feb. 16, 2009), *available at* http://www.abanet.org/domviol/ABA_Policies/134_1_3.pdf (endorsing services and protections provided by NCA-accredited CACs); Catherine Dixon, *Best Practices in the Response to Child Abuse*, 25 Miss. C. L. Rev. 73, 80 (2005) ("The formation of multidisciplinary teams and the collaboration with Children's Advocacy Centers mirrors a national trend, which represents a new standard of best practice and a more effective response to the problem of child abuse.").

When children are questioned using appropriate techniques, the weight of modern research suggests that even very young children can be accurate witnesses. *See* Alison R. Perona et al., *Research-Based Guidelines for Child Forensic Interviews, in* Ending Child Abuse 81, 82 (Victor Vieth et al. eds., 2004) and citations therein. Minimum practice standards have thus focused on critical subjects encompassing the choice and training of interviewers, the location of interviews in a non-threatening setting, and the avoidance of

suspect and coercive techniques and questions in the actual interview.

1. Interviews Should Be Conducted by Appropriate, Trained Personnel

One of the central elements of a child-centered interview is the use of appropriate, trained personnel. The background and training of interviewers is critical to reducing trauma in the interview process, especially for young children. As recognized by several of the *Amici* supporting Petitioners, there is widespread agreement that children's needs and interests are best protected by the use of a multidisciplinary approach to child abuse investigations, allowing for the coordination of law enforcement, child protection, medical and other agencies. Theodore P. Cross et al., *Child Forensic Interviewing in Children's Advocacy Centers: Empirical Data on a Practice Model*, 31 Child Abuse & Neglect 1031, 1033 (2007). Effective multidisciplinary teams ("MDTs") permit the avoidance of repetitive questioning likely to reduce the reliability of a child's testimony as well as the engagement of social services and mental health supports capable of helping child witnesses address the trauma of both the initial interview and subsequent interventions if allegations of abuse are substantiated. *See* Kolbo & Strong, *supra*, at 62 (reviewing the benefits of MDTs, including more accurate risk assessment and prediction; improved interventions; decreased fragmentation and duplication of services, and more reliable evidence). True multidisciplinary interventions seek not only to limit repetitive questioning but also to engage

therapeutic supports for traumatized children at the outset of the process.

While effective multidisciplinary investigations often engage law enforcement, best practices strongly discourage the presence during interviews of armed, uniformed police officers. This tactic is highly intimidating, traumatizes children, and corrodes the reliability of an interview. In its practice guidelines, the American Professional Society on the Abuse of Children ("APSAC") specifically advises that "[l]aw enforcement officers should, if at all possible, arrive in unmarked cars and wear plain clothes." Am. Prof'l Soc'y on the Abuse of Children, *Practice Guidelines: Investigative Interviewing in Cases of Alleged Child Abuse* 3 (2002) [hereinafter *APSAC Guidelines*]; Plach, *supra*, at 85 (same). In a comprehensive and empirically-based report on forensic interviewing, a Michigan Governor's Task Force similarly advises that interviewers should "[a]void wearing uniforms or having guns visible during the interview." Gov.'s Task Force on Children's Justice & Dep't of Human Servs., State of Mich., *Forensic Interviewing Protocol* 6 (2003) [hereinafter *Michigan Interviewing Protocol*], *available at* http://www.michigan.gov/documents/dhs/DHS-PUB-0779_211637_7.pdf.
Indeed, wearing a gun during an interview contravenes best practices even for interrogations of adult criminal suspects. *See* Fred E. Inbau et al., *Criminal Interrogation and Confessions* 70 (4th ed. 2001).

2. Interviews Should Be Conducted in Neutral, Non-Intimidating Settings

Whenever circumstances permit, "interviews should be conducted in a safe, neutral, and preferably child-friendly environment." Cronch et al., *supra*, at 205. Increasingly, multidisciplinary investigations have been facilitated by the use of Children's Advocacy Centers ("CACs"), which serve as neutral, child-friendly settings enabling the coordination of interventions. *See* Dixon, *supra*, at 80. Other settings, such as police stations or schools, may make children feel unsafe, either because they are highly intimidating or because they draw unwanted attention to the child as officers or other officials enter school grounds. NCA Implementation Guide, *supra*, at 51; Plach, *supra*, at 85 ("Having police or child protection come to their school can feel embarrassing, violating, or frightening for some victims."). [4] For these reasons, the use of such settings is widely discouraged. NCA Implementation Guide, *supra*, at 51; APSAC Guidelines, *supra*, at 3; Am. Acad. of Child & Adolescent Psychiatry, *Practice Parameters for the Forensic Evaluation of Children*

---

[4] *Amici* acknowledge that questioning children in school is a common practice, is sanctioned by law in many states, and may be preferable to alternatives such as a police station. This practice admittedly allows social workers to evaluate children promptly while avoiding the constitutional problems inherent in obtaining access to the family home. *See generally* Mark Hardin, *Legal Barriers in Child Abuse Investigations: State Powers and Individual Rights*, 63 Wash L. Rev. 493, 500–548 (1988). However, the convenience to state officials should not be misconstrued as a basis for concluding that the practice is good for children.

and Adolescents Who May Have Been Physically or Sexually Abused, 36 J. Am. Acad. Child & Adolescent Psych. Supp. 37S, 48S (Oct. 1997) [hereinafter *AACAP Practice Parameters*] (recommending use of relaxed, neutral location), *available at* http://www.aacap.org/galleries/PracticeParameters/JAACAP%20Forensic%201997.pdf; Michigan Interviewing Protocol, *supra*, at 5.

Though still small, a growing body of social science strongly suggests that the type of comprehensive, multidisciplinary approach to investigations common to the CAC model not only reduces trauma but also improves reliability, successful prosecutions, and outcomes for children. *See* Cross et al., *supra*, at 1050 ("CACs appeared to offer a more thorough and child-oriented response to child sexual abuse reports, and families appeared to have a more positive experience on average."); Paula Wolfteich & Brittany Loggins, *Evaluation of the Children's Advocacy Center Model*, 24 Child & Adolescent Soc. Work J. 333, 351 (2007) ("[L]ike other multidisciplinary teams, CACs were associated with increased substantiation of cases and a shorter investigative period than traditional child protection services"). Practice standards thus encourage the use of CACs as "the setting where the MDT is best equipped to meet the child's needs during the interview." NCA Standards, *supra*, at 12. *See also* Cronch et al., *supra*, at 205.

3. Interviews Should Avoid Leading, Directive, or Suggestive Tactics

Accepted forensic standards strongly discourage the use of interviewing tactics known to erode the reliability of information provided by children during forensic interviews. The use of certain tactics—including repetition of directive questions, selective reinforcement, guided imagery, and stereotyping—is generally understood to increase the likelihood of child witnesses providing false or inaccurate information. *E.g.*, Ceci & Friedman, *supra*, at 53–54; Wakefield, *supra*, at 57, 65–66. *See also* Task Force on Child Witnesses, Am. Bar Ass'n, *The Child Witness in Criminal Cases* 16 (2003) ("[t]he way children are interviewed . . . has a direct bearing on children's credibility, as improper interviewing may render children's descriptions of abuse unreliable.").

Concerns about the impact of repetitive questions encompass not only the repetition of interviews but also the repetition of questions within a single interview, which has been shown to significantly increase the likelihood of obtaining false information. Ceci & Friedman, *supra*, at 54 ("[N]umerous studies show that when children are exposed to these forms of suggestion the error rates can be very high, sometimes exceeding 50%."); Poole & White, *supra*, at 36 ("[I]n normal conversation, a repeated request implies that the original answer was insufficient in some way."). Other problems known to cause false reporting include an interviewer's preconceived belief that abuse in fact occurred, which can "mold the interview to elicit statements from the interviewee that are consistent

with these prior beliefs." Maggie Bruck et al., *External and Internal Sources of Variation in the Creation of False Reports in Children*, 9 Learning & Individual Differences 289, 293 (1997). Practice standards on forensic interviewing of children thus consistently urge interviewers to minimize the use of all highly leading or coercive tactics that could contaminate the child's reporting of past events. Perona et al., *supra*, at 84; NCA Implementation Guide, *supra*, at 47-48; AACAP Practice Parameters, *supra*, at 48S, 49S; Wakefield, *supra*, at 65-66.

C. Viewed in its Entirety, the Seizure of S.G. Was Conducted in a Manner That Was Harmful to Her, Failed to Advance Any Important State Goal, and Violated Her Rights under the Fourth Amendment

When all of the standards discussed above are contrasted with the seizure of S.G., it is apparent not only that it was deeply flawed, but also that the child suffered substantial and unnecessary harm as a result of these flaws. Camreta was accompanied to the interview by a uniformed deputy sheriff carrying a visible firearm. J.A. at 70, 71; S.G. Dep. 38, Furnanz Aff. Ex. C (Doc. No. 53 in Dist. Ct. Dkt.). Though a more appropriate and supportive facility (the KIDS Center) was available, J.A. at 49; *Greene v. Camreta*, 588 F.3d 1011, 1018 (9th Cir. 2009),[5] Camreta chose the more expedient course of

---

[5] Ms. Greene testified that she would have consented to her daughter being interviewed at the KIDS Center. J.A. at 51.

interrupting S.G.'s school day to interrogate her, *see* J.A. at 70. He offered no justification for this choice other than his generalized and unsubstantiated view that children interrogated in schools feel safe. *Greene*, 588 F.3d at 1016. S.G. was taken out of her classroom by a school counselor, *id.* at 1017, exposing her to unwanted inquiries from her classmates. The location of the interview also isolated S.G. from therapeutic supports that might otherwise have been immediately available. All of these avoidable circumstances contravened established minimum practice standards and dramatically increased both the coercive nature of the interview and the likelihood that it would procure unreliable information.

The continuing manner in which the interview was conducted was equally problematic. The questioning lasted for as much as two hours, throughout which a uniformed sheriff remained in the room with his weapon visible to S.G. J.A. at 48, 54–55, 72. According to S.G.'s recollection, Camreta posed questions in a manner that was highly coercive; S.G. recalled that Camreta asked her the same questions over and over again, pressing her until she finally agreed that she had been touched inappropriately by her father. J.A. at 47–48, 57, 71.[6]

---

[6] Though Alford had a recording device available to him, J.A. at 39, neither he nor Camreta recorded the interview, *Greene*, F.3d at 17, making careful scrutiny of their tactics impossible. *See* Wakefield, *supra*, at 61 (noting strong consensus that forensic interviews of child witnesses should be taped); Amy Russell, *Electronic Recordings of Child Investigative Interviews*, Centerpiece (Nat'l Child Prot. Training Ctr., St. Paul, Minn.), June 2009, at 1-4 (describing growing body of evidence that it is best practice to videotape

S.G.'s account strongly suggests that, rather than maintaining neutrality, Camreta persisted with directed questions until he secured answers consistent with his predetermined conclusions about Greene's guilt. *See* Carter, *supra*, at 79 ("Whatever the age, prolonging an interview beyond a child's attentional capacity increases the risk that a child will start to impulsively answer questions, accurately or not, simply to end the interview."). Based on these failings, the suggestion that the instant interrogation overall was consistent with practice standards, *see, e.g.*, Nat'l Ass'n of Soc. Workers *Amicus* Br. 25–32, simply cannot be reconciled with the facts of record.

Under these circumstances, it was predictable that the two state-based interventions that followed from S.G.'s initial interrogation—the indictment of her father and the removal of S.G. and her sister into foster care—both collapsed under the weight of unreliable information. During a subsequent interview, S.G. recanted her inculpatory statements about her father and reiterated her initial statements denying allegations of wrongdoing. *Greene*, 588 F.3d at 1019.[7] Given the problems

---

forensic interviews), *available at* http://www.ncptc.org/vertical/Sites/%7B8634A6E1-FAD2-4381-9C0D-5DC7E93C9410%7D/uploads/%7B0B9329AD-C748-4012-8954-C3E8587A9865%7D.PDF.

[7] Though not directly relevant to the evaluation of her initial interrogation under the Fourth Amendment, S.G.'s account of her treatment at this subsequent interview suggests that it too was highly traumatizing. S.G. reported that she was told to undress, that the examiners looked all over her body and took pictures of her private parts, and that they used a

associated with Camreta's initial interview of S.G., there was simply no way for the KIDS Center staff either to repair the damage through subsequent questioning or to reach a definitive conclusion about the presence or absence of sex abuse. Though concerned about the possible reasons for the recantation, they could not determine whether sexual abuse had occurred. *Id.* at 1019–20. The placement of S.G. and her sister in foster care—intended to protect them from further harm—consequently ended less than three weeks later, after child protection authorities proved unable to evaluate effectively the merits of S.G.'s inculpatory statements about her father. J.A. at 67–68; *Greene*, 588 F.3d at 1019–20. Criminal charges against S.G.'s father remained pending for 18 months, with all charges relating to the alleged abuse of S.G. ultimately dropped following a hung jury and a subsequent plea agreement on another charge involving a different child. J.A. at 64; *Greene*, 588 F.3d at 1020.

For S.G., the consequences of the state's failed intervention were far from benign. This Court has indicated that in some circumstances, where the intrusive effect of a search or seizure is modest, state action that might otherwise be suspect may nonetheless be sanctioned as consistent with the Fourth Amendment. *Lidster*, 540 U.S. at 424–25 (holding that brief traffic stops aimed at gathering information about a specific crime may be permissible despite the absence of any

---

magnifying glass to examine and photograph her genitals. *Greene*, 588 F.3d at 1019; J.A. at 73.

individualized suspicion). Here, however, S.G. will likely suffer substantial, long-lasting consequences arising from the interventions initiated by Camreta's interrogation. *See* Fahlberg, *supra*, at 166.

Much of the obvious harm suffered by S.G. was a function of the interrogation itself, independent of the interventions prompted by her allegation of abuse against her father. In her affidavit to the district court, S.G. stated that following the interview "my stomach felt upside down and I was confused and disoriented." J.A. at 72. S.G. attested further that she felt scared and sick to her stomach during the interview, J.A. at 54, 71, and both she and her mother attested that S.G. threw up repeatedly after returning home, J.A. at 43, 48, 49, 59, 63, 72. These reactions to the interrogation conducted by Camreta are typical of the kinds of harms often suffered by children who are closely examined about highly sensitive allegations of sex abuse. *See* Goodman et al., *supra*, at 88.

In S.G.'s case, these harms were amplified by other interventions prompted by what Respondent reasonably described as coerced disclosures. J.A. at 63. Though it lasted only for several weeks, J.A. at 68, the removal of S.G. from her family was inescapably traumatizing. The child was separated from both her father and her mother, who was not suspected of abuse. S.G.'s disclosures also prompted the removal of her younger sister from her parents' home. *Greene*, 588 F.3d at 1019. The separation must have weighed especially heavily on S.G., who plainly understood that she was responsible for turning all of their lives upside down. *Id.* at 1019–20. As is common for children who see themselves as

responsible for a forced separation from their parents, this feeling increased the likelihood of S.G. experiencing chronic guilt, sadness, and depression. Fahlberg, *supra*, at 150–51, 167. All of these presumed harms were no doubt further exacerbated by the prospect that S.G.'s father might be forced out of the home for a much longer time by a criminal conviction for abusing his daughter. Finally, the possibility remains that, as a direct result of Camreta's coercive interrogation of S.G., state officials were forced to return the child to the care of an abusive father.

Camreta's interrogation of S.G. failed to establish a legitimate basis for either the placement of S.G. and her sister into foster care, or the criminal prosecution of Greene for the alleged abuse of his daughter. The predictability of these failures arose from patent deviations from minimum standard practices in the forensic evaluation of suspected child abuse. Though it was intended to serve an important purpose, Camreta's seizure and questioning of S.G. cannot be said to have actually advanced any legitimate state goal. *See Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 47–48 (1981) (holding that state action that needlessly or erroneously separates a parent from his or her child does not serve the state's interest as *parens patriae* and must therefore be viewed as constitutionally suspect). These failures and accompanying harms, when weighed in the balance of this Court's constitutional analysis, negate Petitioners' claims that the challenged seizure actually served a legitimate state purpose and undermine their conclusion that it comported with the requirements of the Fourth Amendment.

Finally, *Amici* here urge this Court to reject the contention of Petitioners that acknowledging the violation of the Fourth Amendment that occurred here would unduly burden the state in discharging its protective function. Much of this concern arises from the presumptive extension of the Ninth Circuit's ruling to different factual scenarios that are not presented by this case and are not at issue here. Critical to the lower court's conclusion in this case was the extensive entanglement of law enforcement: though Sheriff Alford remained silent, his presence pervaded both the interview and its aftermath, including the criminal prosecution of Greene. *Greene*, 588 F.3d at 1027–29. *See also Ferguson v. City of Charleston*, 532 U.S. 67, 83–86 (2001) (finding the law enforcement purpose objective of the searches to be dispositive to the Court's conclusion that forced pre-natal drug testing violated Fourth Amendment). However, the Fourth Amendment is not necessarily implicated in every situation involving the questioning of a child by a representative of the state. The logic of the decision below does not compel the conclusion that the same constitutional requirements must apply whenever child protection investigators question children outside the presence of law enforcement or even in other settings (such as a CAC) where police officers may observe a carefully conducted child interview.

Moreover, in the vast majority of situations, child protection investigators may secure adequate and timely access to suspected child victims, either by securing parental consent, Coleman, *supra*, at 430 n.38, or by virtue of exigent circumstances obviating the need for a warrant, *see Tenenbaum v.*

Williams, 193 F.3d 581, 605 (2d Cir. 1999) (holding that exigent circumstances exist in any situation where a person of reasonable caution would believe a child to be at immediate risk of abuse without sufficient time to obtain a warrant). Many jurisdictions explicitly authorize officials to seek a warrant or a court order when they are refused access to a child. *See, e.g.*, Fla. Stat. § 39.301(13); 325 Ill. Comp. Stat. 5/7.5. Some jurisdictions allow for this recourse on an expedited basis, ensuring the state's ability to move promptly to protect children who appear to be in immediate jeopardy. *See, e.g.*, N.Y. Fam. Ct. Act § 1034(2) (providing investigators with 24-hour access to court officers able to order a parent to produce a child).

In sum, under the circumstances presented here—where an investigator chooses not to seek the consent of the non-offending parent, waits four days after learning of reported abuse, has no clearly established exigent circumstances, and wishes to engage the potentially coercive presence of law enforcement for an interview in the child's school—the interests of children are best served by acknowledging Petitioners' violation of the Fourth Amendment.

IV. THE STATE'S INTEREST IN PROTECTING CHILDREN FROM ABUSE MUST BE BALANCED WITH THE CHILD'S RIGHT TO BE FREE FROM UNWARRANTED INTRUSION AND INTERFERENCE WITH HER FAMILY RELATIONSHIPS

As noted above, the evaluation of a claim under the Fourth Amendment must account not only for the extent to which the challenged seizure actually advances the public interest but also the affected individual's interests in safeguarding her legitimate expectations of privacy and personal security. *Lidster*, 540 U.S. at 427. Here, the seizure at issue involved an interrogation of a child about the intimate details of her family life in order to, among other things, inform a decision regarding whether she ought to be separated from her parents. Such a seizure obviously implicates the child's right to be free from undue intrusions into her privacy. Both Petitioners acknowledge this right, arguing its limitations in the school context. *See* Camreta Br., at 30–34; Alford Br., at 50–53. However, because the challenged interrogation threatened the integrity of S.G.'s family, it thereby also implicated her family's substantive right to due process under the Fourteenth Amendment. *See Stanley v. Illinois*, 405 U.S. 645, 657–58 (1972) (applying the Fourteenth Amendment to state proceedings aimed at depriving a parent of the custody of his child). [8] This

[8] The Ninth Circuit noted that S.G. and her family did not raise directly on appeal a claim that the seizure at issue violated their familial rights under the Fourteenth Amendment, *Greene v. Camreta*, 588 F.3d. at 1022 n.6, notwithstanding the

interest—unrecognized by Petitioners—must also be considered if this Court is to fairly serve *all* of the interests of children impacted by the design of states' investigative processes.

Substantive due process "protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977). The family is the foundation of our society—"the most fundamental social institution." *Trimble v. Gordon*, 430 U.S. 762, 769 (1977). Its importance "stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children.'" *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 844 (1977) (alteration in original) (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 231–33 (1972)).[9]

---

possibility that a plaintiff might maintain separate claims under both the Fourth and Fourteenth Amendments, when a government's physical seizure of a child coincides with other conduct interfering with the parent-child relationship (such as a custodial interview of the child without parental consent, probable cause to suspect child abuse, or exigent circumstances), *see Doe v. Heck*, 327 F.3d 492, 518 n.23 (7th Cir. 2003). Nonetheless, to a very large extent, the family's rights under the Fourteenth Amendment inform the individual interests that must be balanced in addressing S.G.'s Fourth Amendment claim. They are thus still highly pertinent to this appeal.

[9] The integrity of the familial relationship is an interest that is protected not only by the Due Process Clause of the Fourteenth Amendment, *e.g. Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), but also by the Equal Protection Clause of the Fourteenth Amendment, *e.g., Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), the First Amendment, *e.g., Wisconsin v. Yoder*,

Federal law thus aims not only at the prevention of child abuse but also the "support for needed services to prevent the unnecessary removal of children from families." 42 U.S.C. § 5101 note (Congressional Findings).

To be sure, a parent's right to raise his or her child without state interference is necessarily limited by the state's interest in ensuring the child's welfare and safety. *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1944); *Santosky*, 455 U.S. 745, 766 (1982). However, while the family's right is not absolute, neither is the state's power to intrude on the family in the name of child protection. *Hodgson v. Minnesota*, 497 U.S. 417, 447–48 (1990) ("[W]hen the government intrudes on choices concerning the arrangement of the household, this Court has carefully examined the 'governmental interests advanced and the extent to which they are served by the challenged regulation.'" (quoting *Moore*, 431 U.S. at 499)). Due to the fundamental nature of rights associated with the family, this Court has made clear that substantive due process demands "particularly careful scrutiny of the state needs asserted to justify [the] abridgment" of such rights. *Moore*, 431 U.S. at 502 (citation omitted) (internal quotation marks omitted). *See also Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring) (urging strict scrutiny of claimed violations of familial rights).

---

406 U.S. 205, 234 (1972), and the Ninth Amendment, *e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

While this Court has repeatedly affirmed constitutional protections for the rights of *parents* to guide the upbringing of their children, it has had less occasion to acknowledge the independent right of the *child* to similar protections. Nonetheless, the decisions of this and other courts make clear that the interests of children and parents in preserving the integrity of their familial relationships are shared and reciprocal. This Court in *Santosky* acknowledged this fundamental aspect of Fourteenth Amendment doctrine when it held that, absent some showing of parental unfitness, the state may not presume that children and their parents are adversaries. 455 U.S. at 760. In reaching this conclusion, Justice Blackmun stated that "the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." *Id.* While this Court has never held directly that a child has the substantive right to the care, custody and companionship of his or her parent, *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989) (reserving question), it stands to reason that such a right exists. Indeed, for nearly 90 years, this Court has suggested that a child has rights reciprocal to those of her parents. *See, e.g., Pierce v. Soc'y of Sisters,* 268 U.S. 510, 532 (1925) (considering both the "right of parents to choose schools where their children will receive appropriate mental and religious training, [and] the right of the child to influence the parents' choice"); *Prince,* 321 U.S. at 165 (finding at stake "rights of children to exercise their religion, and of parents to give them religious training").[10]

---

[10] In considering claims under the Fourteenth

Amendment, the Circuit Courts have consistently treated the child's relationships with family members as not just an important interest but also an independent and enforceable right, separate and apart from that of the parent. *See, e.g., Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) ("[T]he right of the family to remain together without the coercive interference of the awesome power of the state. . . . encompasses the reciprocal rights of . . . . children in not being dislocated from the emotional attachments that derive from the intimacy of daily association, with the parent. This mutual interest in an interdependent relationship has received consistent support in the cases of the Supreme Court." (citations omitted) (internal quotation marks omitted)); *Lehman v. Lycoming Cnty. Children's Svcs. Agency*, 648 F.2d 135, 152 (3d Cir. 1981), *aff'd*, 458 U.S. 502 (1982) ("Clearly, the parental interest in the companionship, care and custody of the children is a strong one and is reciprocated by the child's equally weighty interest in the nurture, love and instruction of the parents."); *Wooley v. City of Baton Rouge*, 211 F.3d 913, 923 (5th Cir. 2000) ("[A] child's right to family integrity is concomitant to that of a parent"); *Doe v. Heck*, 327 F.3d 492, 520 (7th Cir. 2003) ("Equally fundamental is the right of a child to be raised and nurtured by his parents."); *Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9th Cir. 1987) ("[C]onstitutional interest in familial companionship and society logically extends to protect children from unwarranted state interference with their relationships with their parents."), *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999); *Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 1999) ("The right to family association includes the right of parents to make important medical decisions for their children, and of children to have those decisions made by their parents rather than the state."); *J.B. v. Washington Cnty.*, 127 F.3d 919, 925 (10th Cir. 1997) ("[F]orced separation of parent from child, even for a short time, represents a serious impingement upon both the parents' and child's rights." (citations omitted) (internal quotation marks omitted)); *Franz v. United States*, 707 F.2d 582, 595 ("The constitutional interest in the development of parental and filial bonds free from government interference . . . . is manifested in the reciprocal rights of parent and child to one

Moreover, outside of the family context, this Court has often acknowledged that children possess fundamental rights limiting the exercise of state power. For example, this Court recently determined that a school's strip searching of a child violated her rights under the Fourth Amendment. *Safford Unified School Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2643 (2009). Other decisions have acknowledged the child's independent rights to be free from double jeopardy in juvenile court adjudications, *Breed v. Jones*, 421 U.S. 519, 531 (1975); to freedom of speech, *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 511 (1969); to due process in delinquency proceedings, *In re Gault*, 387 U.S. 1, 30–31 (1967); and not to be convicted on the basis of a coerced confession, *Haley v. Ohio*, 332 U.S. 596, 601 (1948). Due to children's immaturity and vulnerability, they possess even greater rights than adults in certain circumstances. *See, e.g., Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010), *as modified* (July 6, 2010) (prohibiting the imposition of a life without parole sentence on a juvenile offender who did not commit homicide); *Roper v. Simmons*, 543 U.S. 551, 568 (2005) (holding that the death penalty is unconstitutional when imposed on a juvenile offender). This Court has also made clear that, "[s]tudents in school as well as out of school . . . . are possessed of fundamental rights which the State must respect." *Tinker*, 393 U.S. at 511. *See also Goss v. Lopez*, 419 U.S. 565, 584 (1975) (prohibiting the

---

another's companionship." (citations omitted) (internal quotation marks omitted)).

suspension of a public school student without notice and opportunity for hearing).

In sum, when state actors seek to interrogate suspected victims of child abuse without any of the traditional safeguards of the Fourth Amendment, their conduct implicates fundamental, constitutionally protected rights and interests that belong not just to the bypassed parents, but also to the children themselves. This Court has acknowledged that the child's interest in the integrity of her relationships with family is a fundamental interest protected by the Fourteenth Amendment. Even where a claim is premised solely on the Fourth Amendment, this interest must still weigh heavily in the balance against any state interrogation of a child that is conducted in the absence of a warrant, court order, probable cause, parental consent, or exigent circumstances.

CONCLUSION

As noted at the outset of this Brief, *Amici* acknowledge and endorse the critical importance of ensuring that the state is fully equipped to investigate and respond to allegations of child sex abuse. Especially when such allegations are aimed at a child's parent, the challenges faced by the state not only are complicated, but also carry grave consequences for the children and families involved. It is vitally important for this Court to ensure that state actors have the tools necessary to achieve its protective goals. However, if an interrogation is conducted in a manner so deficient that it unnecessarily traumatizes the child and produces unreliable information that is insufficient to sustain consequent interventions, then the state has caused harm without actually advancing its protective goals. The seizure at issue here represents just such an instance. For these reasons, *Amici* urge this Court to find that it violated the Fourth Amendment and affirm the decision below.

Respectfully submitted,

Bruce A. Boyer
Counsel of Record
Miranda B. Johnson
Civitas ChildLaw Clinic
Loyola University Chicago School of Law
25 East Pearson Street
Suite 1100
Chicago, Illinois 60611
(312) 915-7940
bboyer@luc.edu

Counsel for *Amici Curiae*

Dated: January 31, 2011

APPENDIX A

IDENTITY OF *AMICI CURIAE* AND STATEMENTS OF INTEREST

Organizations

The ***Civitas* ChildLaw Center** is a program of the Loyola University Chicago School of Law, whose mission is to prepare law students and lawyers to be ethical and effective advocates for children and promote justice for children through interdisciplinary teaching, scholarship and service. Through its ChildLaw Clinic, the ChildLaw Center also routinely provides representation to child clients in child protection proceedings and other types of cases involving children. The ChildLaw Center maintains a particular interest in the rules and procedures regulating the legal and governmental institutions responsible for addressing the needs and interests of court involved youth. It is committed to the idea that the public entities serving at-risk children and families should always seek to minimize the harm to children following from state interventions. Professor Bruce A. Boyer, counsel of record for *Amici*, is the Director of the ChildLaw Clinic and has litigated, taught, consulted, and written extensively in the area of child abuse and neglect for more than 20 years.

The **National Center for Youth Law (NCYL)** is a private, non-profit organization devoted to using the law to improve the lives of poor children nation-wide. For more than 30 years, NCYL's staff of attorneys has worked to protect the rights of low-income children and to ensure that they have the resources, support and opportunities they need to become self-sufficient adults. NCYL provides representation to children and youth in cases that have a broad impact on the systems meant to protect them. NCYL also engages in legislative and administrative advocacy to provide children a voice in policy decisions that affect their lives. As part of the organization's child welfare reform work, NCYL works to ensure the safety, stability, and well-being of abused and neglected children. NCYL's class actions in states like Arkansas, Utah, and Washington have focused on improving the child protective services policies and practices of state and local agencies.

The **Clinical Social Work Association (CSWA)** is a national professional membership organization representing social workers who specialize in providing mental health services to adults and children. The CSWA supports the profession by providing clinical training, state and national legislative advocacy on mental health issues, and information to maintain ethical practice protocols. The primary responsibility of the clinical social worker is to the individual client, the family or the group with whom he or she has a professional relationship. Clinical social workers respect the dignity, protect the welfare, and maximize the self-determination of the clients with whom they

work. Clinical social workers practice their profession in compliance with legal standards, and do not participate in arrangements or activities which undermine or violate the law. When they believe, however, that laws or community standards are in conflict with the principles and ethics of the profession, they make known the conflict and work responsibly toward change that is in the public interest.

The **Southern Poverty Law Center ("SPLC")** is a nonprofit civil rights organization dedicated to fighting hate and bigotry, and to seeking justice for the most vulnerable members of society. Founded in 1971, SPLC staff work to break the cycle of juvenile incarceration by making juvenile justice and education systems more responsive to the needs of children, families and the communities in which they live. SPLC has represented and continues to represent youngsters who are subject to unlawful arrest and excessive force at school. The organization seeks reform through public education, community organizing, litigation, legislative advocacy, training and technical assistance. SPLC is based in Montgomery, Alabama, and has offices in Atlanta, New Orleans, Miami, and Jackson, Missippi.

Lawyers for Children ("LFC"), since its founding in 1984, has safeguarded the rights of more than 40,000 young people in foster care in New York City and achieved critical reforms of the foster care system through legislative reform and as plaintiffs' counsel in class action litigation. This year, the organization will provide free legal and social work

services to children and young adults in more than 6,000 Family Court cases involving abuse, neglect, voluntary foster care placement, custody, visitation, paternity, guardianship and adoption. In addition, LFC publishes guidebooks and conducts trainings for children, legal practitioners and social workers working in the foster care system. LFC's insight into the issues raised in the instant case is borne of more than 25 years experience of interdisciplinary practice between attorneys and social workers representing children in the child welfare system.

The **Children and Family Justice Center of the Northwestern University School of Law (CFJC)** is a comprehensive children's law center that has represented young people in conflict with the law for over 20 years. In addition to its direct representation of youth and families in matters relating to delinquency and crime, school discipline, immigration/asylum, and fair sentencing practices, the CFJC collaborates with community members and with child welfare, educational, mental health and juvenile justice advocates nationwide to develop fair and effective strategies for systems reform.

The **Children's Advocacy Clinic** is an educational program of the Pennsylvania State University Dickinson School of Law. The Children's Advocacy Clinic has a dual function of providing an education to law students in the practice of law, while simultaneously providing quality legal representation and advocacy for its child clients. The Clinic receives court appointments to represent children in civil matters, specializing in child welfare practice and operates as an

inter-disciplinary law office, combining the expertise of law, social work and medicine. Students participating in the Children's Advocacy Clinic also work to address systemic child welfare issues through policy and legislative advocacy.

Individuals

Professor Michael S. Wald is the Jackson Eli Reynolds Professor of Law, Emeritus, at Stanford Law School. Professor Wald has worked on issues related to abused and neglected children for more than 40 years. He has taught courses on policy related to child maltreatment and written numerous articles and books on protecting children from maltreatment. Among his many professional activities, he was co-reporter for the American Bar Association Standards on Child Abuse and Neglect and the primary draftsman of major federal and state laws related to child maltreatment. He also has represented children in dependency proceedings in California and the District of Columbia, was Director of the San Francisco Department of Human services, which is responsible for administering child protection programs, and has served as a judge *pro tem* in many juvenile court child protection proceedings. Professor Wald also has served as Chair of the California State Committee on Child Abuse and Neglect, was a member of the United States Advisory Committee on Child Abuse, and serves as a board member of the National Committee for the Prevention of Child Abuse.

Donald N. Duquette, Clinical Professor of Law and Director, Child Advocacy Clinic, University of Michigan Law School, founded the Child Advocacy Law Clinic in 1976, the oldest such clinic in the United States. One characteristic of this clinic is that law students not only represent children alleged to be abused or neglected but also represent the county agency bringing such cases and parents accused of child abuse or neglect. This representation occurs in separate Michigan counties to avoid conflict of interest but serves to hone a more objective view of the child protection issues. In each of these advocacy roles he has a strong interest in careful, professional, and competent child maltreatment investigations. Duquette's 1990 book, *Advocating for the Child in Protection Proceedings*, formed the conceptual framework for the first national evaluation of child representation as mandated by the U.S. Congress. His most recent book, *Child Welfare Law and Practice: Representing Children, Parents and State Agencies in Abuse, Neglect and Dependency Proceedings* (Donald N. Duquette & Ann M. Haralambie eds., 2d ed. 2010), defines the scope and duties of a brand-new legal specialty in child welfare law and prepares experienced lawyers for a national certifying examination. Duquette collaborated with the National Association of Counsel for Children to develop the national certification program, which gained American Bar Association accreditation in February 2004 and is now available as a specialty in 29 U.S. jurisdictions. Duquette's research and teaching interests are in interdisciplinary approaches to child welfare law and policy. During a leave from the Law School, he managed an expert

work group for the Children's Bureau of the United States Department for Health and Human Services and drafted *Guidelines for Public Policy and State Legislation Governing Permanence for Children* (1999) as part of President Clinton's Adoption 2002 Initiative on Adoption and Foster Care. For over 25 years, Duquette was the principal legal trainer for the child protective and foster care caseworkers in Michigan, including training in legal aspects of child protection investigations. Based on all of this experience, he has a particular interest in the integrity of the investigative practices that bring children into contact with child protection systems.

Erik S. Pitchal is an assistant clinical professor of law at Suffolk University Law School in Boston and the founding director of its Child Advocacy Clinic. He has represented children in the dependency system in New York and Massachusetts and authored several publications concerning children and the law. He regularly presents training workshops to lawyers who represent children, parents, and state agencies in dependency proceedings. From this professional experience, he has an interest in ensuring that the public systems addressing allegations of abuse or neglect limit harm to children.

Professor Paul Bennett is currently Co-Director of the Child and Family Law Clinic at the University of Arizona, James E. Rogers College of Law. For the last 14 years, working with supervised law students, he has served in the Pima County Juvenile Court in Tucson, Arizona as a court-appointed lawyer or guardian *ad litem* for

children who have been removed from their homes and placed in foster care. From December 1996 until August 2009, he was the Director of the Child Advocacy Clinic at the same law college. He is a member of the Model Court Working Committee for the Pima County Juvenile Court and, as such, participates in developing policies and protocols in child protection proceedings for the Court. As someone who for years has represented children in child protection cases, he is intimately familiar with both the profound need to protect vulnerable children from child sexual abuse and the serious damage to families and children that can be caused by well-intentioned forensic interviews of children when those interviews are conducted in coercive settings, use suggestive methodologies, or are led by persons without proper forensic interview training. Reasonable oversight—whether that be parental or judicial—is absolutely necessary to protect children and families from well-meaning but poorly conducted interrogation of children.

Nos. 09-1454 & 09-1478

Supreme Court, U.S.
FILED
JAN 28 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, et al.,

Respondents.

JAMES ALFORD,

Petitioner,

v.

SARAH GREENE, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICI CURIAE BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (NACDL), CIVIL RIGHTS AND LIBERTIES COMMITTEE OF THE NEW YORK COUNTY LAWYERS' ASSOCIATION (NYCLA), AND CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF RESPONDENTS

MARK R. BROWN
Counsel of Record
303 E. Broad Street
Columbus, Ohio 43215
(614) 236-6590
mbrown@law.capital.edu

DAVID M. PORTER
Co-Chair, NACDL
Amicus Committee
801 I Street, 3rd Floor
Sacramento, California 95814
(916) 498-5700

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
Interest of *Amici Curiae*	1
Statement of Facts	3
Summary of Argument	5
Argument	8
I. S.G.'s Detention and Two-Hour Interrogation Was a Full Seizure Within the Meaning of the Fourth Amendment	8
II. History Supports the Conclusion that Petitioners' Warrantless Seizure of S.G. Violated the Fourth Amendment	12
A. Children in the Eighteenth and Nineteenth Centuries Could Not Be Summarily Taken From Their Parents By Government Officials	14
1. Founding to Civil War	14
2. Post-Civil War to Twentieth Century	17
B. Twentieth-Century Reform Efforts Established Governmental Programs to Address Neglected and Abandoned Children	20
III. No Recognized Exception Justifies Dispensing With Warrants When Seizing Children	25
A. *T.L.O.* Does Not Control	25
B. Familial Privacy Is Fundamental	28

TABLE OF CONTENTS – Continued

Page

C. *Lidster*'s Focus Was Brief Encounters 30

IV. Familial Rights Do Not Evaporate at the Home's Threshold 31

V. Summary Seizures Are Not Necessary to Achieve a Compelling Interest 35

Conclusion 39

TABLE OF AUTHORITIES

Page

CASES

Arizona v. Gant, 540 U.S. 963 (2003) 2

Barron v. Mayor of City of Baltimore, 32 U.S. 243 (1833) 16

Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002) 26, 27

California v. Hodari D., 499 U.S. 621 (1991) 9

Central Virginia Community College v. Katz, 546 U.S. 356 (2006) 15

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 11

Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001) 37

Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee, 129 S. Ct. 846 (2009) 3

Doe v. Heck, 327 F.3d 492 (7th Cir. 2003) 8

Ferguson v. City of Charleston, 532 U.S. 67 (2001) 6, 25, 27

Florida v. Royer, 460 U.S. 491 (1983) 5, 11

Florida v. Thomas, 532 U.S. 774 (2001) 2

Grayned v. City of Rockford, 408 U.S. 104 (1983) 38

Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009) 9, 12, 35, 37

TABLE OF AUTHORITIES – Continued

Page

Greene v. Camreta, No. 05-6047, 2006 WL 758547 (D. Ore. 2006) 9

Hoffman v. Harris, 511 U.S. 1060 (1994) 38

Illinois v. Gates, 462 U.S. 213 (1983) 37

Illinois v. Lidster, 540 U.S. 419 (2004) 30, 31

Immigration and Naturalization Service v. Delgado, 466 U.S. 210 (1984) 8

In re Gault, 387 U.S. 1 (1967) 22, 23, 24, 38

Johnson v. Sackett, 793 So.2d 20 (Fla. App. 2001) 38

Kalmanson v. Lockett, 848 So.2d 374 (Fla. App. 2003) 35

Kolender v. Lawson, 461 U.S. 352 (1983) 38

Lassiter v. Department of Social Services, 452 U.S. 18 (1981) 30

M.L.B. v. S.L.J., 519 U.S. 102 (1996) 30

Mapp v. Ohio, 367 U.S. 643 (1961) 22

Marshall v. Barlow's, Inc., 436 U.S. 307 (1978) 8, 36, 37

McCabe v. Life-Line Ambulance Service, 77 F.3d 540 (1st Cir. 1996) 9

Meyer v. Nebraska, 262 U.S. 390 (1923) 29

Michigan v. Chesternut, 486 U.S. 567 (1988) 8

Mincey v. Arizona, 437 U.S. 385 (1978) 35

New Jersey v. T.L.O., 469 U.S. 325 (1985) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

New York v. Burger, 482 U.S. 691 (1987) 25

Newton v. Burgin, 414 U.S. 1139 (1974).....35

Ornelas v. United States, 517 U.S. 690 (1996) 38

Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).....15, 38

Payton v. New York, 445 U.S. 573 (1980).....13, 28, 29

Pierce v. Society of Sisters, 268 U.S. 510 (1925).....29

Rasul v. Bush, 542 U.S. 466 (2004).....2

Reno v. Flores, 507 U.S. 292 (1993) 9

Robinson v. California, 370 U.S. 660 (1962) 32

Safford Unified School District No. 1 v. Redding, 129 S. Ct. 2633 (2009) .....*passim*

Santosky v. Kramer, 455 U.S. 745 (1982).....30

Schmerber v. California, 384 U.S. 757 (1966).....26

Skilling v. United States, 130 S. Ct. 2896 (2010).....32

Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989).....26

Stanley v. Illinois, 405 U.S. 645 (1972).....6, 30

Terry v. Ohio, 392 U.S. 1 (1968) 11, 12

Thornton v. United States, 541 U.S. 615 (2004).....2

Treasury Employees v. Von Raab, 489 U.S. 656 (1989).....26

Troxel v. Granville, 530 U.S. 57 (2000).....29, 30

TABLE OF AUTHORITIES – Continued

Page

United States v. Mendenhall, 446 U.S. 544 (1980) 8, 10, 11

United States v. Watson, 423 U.S. 411 (1976) ..... *passim*

Villanova v. Abrams, 972 F.2d 792 (7th Cir. 1992) 8

Wallace v. Kern, 520 F.2d 400 (2d Cir. 1975) 2

Walsh v. Erie County Department of Job and Family Services, 240 F. Supp. 2d 731 (N.D. Ohio 2003) 14

Wernecke v. Garcia, 591 F.3d 386 (5th Cir. 2009) 9

Winston v. Lee, 470 U.S. 753 (1985) 28

FEDERAL STATUTES

Child Abuse Prevention and Treatment Act (CAPTA), Pub. L. No. 93-247, 88 Stat. 4 (1974) 21

Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272, 94 Stat. 500 (1980) 21

Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997) 21

42 U.S.C. § 1983 4

STATE STATUTES

ALA. CODE § 12-15-125(a) 36

ARIZ. REV. STAT. §§ 8-303 & 8-821 36

TABLE OF AUTHORITIES – Continued

Page

GA. CODE ANN. § 15-11-45 36

N.D. CENT. CODE § 27-20-13 36

OR. REV. STAT. § 419B.150(1)(a) 14

PA. CONSOL. STAT. ANN. § 6324 36

WIS. STAT. § 48.19(d) 36

RULES

S. Ct. Rule 37.3 1

S. Ct. Rule 37.6 1

MISCELLANEOUS

WILLIAM BLACKSTONE, COMMENTARIES 15

Mark R. Brown, *Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process*, 65 OHIO ST. L.J. 913 (2004) 36

Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protection Proceedings*, 42 FAM. CT. REV. 540 (2004) 34

Howard A. Davidson, *Child Protection Policy and Practice at Century's End*, 33 FAM. L.Q. 765 (1999) ..... *passim*

Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1190-91 (1971) 16, 17

TABLE OF AUTHORITIES – Continued

Page

Janet Gilbert, Richard Grimm & John Parnham, *Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency)*, 52 ALA. L. REV. 1153 (2001) 16

Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEORGETOWN L.J. 299 (2002) 15, 18, 19, 20

4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 9.2 (2010) 11

WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.2 (2010) 32

Model Juvenile Court Act, § 13(a)(1), 9A U.L.A. 22 (1968) 23

Model Juvenile Court Act, § 13(a)(2), 9A U.L.A. 22 (1968) 23

Model Juvenile Court Act, § 13(a)(3), 9A U.L.A. 22 (1968) 23

Model Juvenile Court Act, § 13(a)(4), 9A U.L.A. 22 (1968) 23

Model Juvenile Court Act, § 14, 9A U.L.A. 22 (1968) 23

Model Juvenile Court Act, § 15(a)(1), 9A U.L.A. 22 (1968) 23

Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461 38

TABLE OF AUTHORITIES – Continued

Page

Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S. CAROLINA L. REV. 205, 210 (1971) 15

Harold A. Richman, *From a Radiologist's Judgment to Public Policy on Child Abuse and Neglect: What Have We Wrought?*, 30 PEDIATRIC RADIOLOGY 219, 220 (2000) 20, 21, 29, 33, 34

William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 891 (1991) 38, 39

William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. Rev. 842, 848 (2001) 38

Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status*, 16 STAN. L. REV. 257 (1964) 15, 16

Marvin Ventrell, *From Cause to Profession: The Development of Children Law and Practice*, 32 Jan. COLO. LAW. 65 (2003) 16, 17, 18

United States Department of Health and Human Services Administration for Children and Families, Appendix G: Highlights of Child Maltreatment 2003, http://www.acf.hhs.gov/programs/cb/pubs/cwo03/appendix/appendixg.htm (last visited January 4, 2011) 33

INTEREST OF *AMICI CURIAE*[1]

1. The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 35,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the Bill of Rights. NACDL files approximately 35 *amicus curiae* briefs each year on various issues in this Court and other courts. NACDL has previously filed *amicus curiae* briefs in this Court in cases, like the present one, involving the validity of searches and

---

[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Respondents have filed a global consent to *amici* filings, and letters of consent to the filing of this brief from petitioners have been lodged with the Clerk of the Court pursuant to Rule 37.3.

seizures under the Fourth Amendment. *See, e.g., Thornton v. United States,* 541 U.S. 615 (2004); *Arizona v. Gant,* 540 U.S. 963 (2003); *Florida v. Thomas,* 532 U.S. 774 (2001).

2. The Civil Rights and Liberties Committee of the New York County Lawyers' Association ("NYCLA") was established in 1938. The Committee sponsors forums, prepares reports and helps coordinate *pro bono* projects on topics such as advocacy for the indigent, education and employment for ex-offenders, collateral consequences of convictions, and bullying in the schools. NYCLA, a 9,000-member bar association, was established in 1908 with a policy that any lawyer admitted to practice could join regardless of race, religion, gender or ethnicity.

3. The Center for Constitutional Rights is a national non-profit legal, educational and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966, the Center has litigated numerous landmark civil and human rights cases, many of which have focused on ensuring the fair and humane treatment for all persons involved in the American criminal justice system. *See, e.g., Rasul v. Bush*, 542 U.S. 466 (2004); *Wallace v. Kern*, 520 F.2d 400 (2d Cir. 1975).

STATEMENT OF FACTS[2]

Petitioner-Camreta is an investigator for the Oregon Department of Human Services (ODHS). Petitioner-Alford is a deputy sheriff. Respondent, Sarah Greene, is the mother of a nine-year-old girl (S.G.)[3] who was forcibly removed from her elementary school and interrogated for two hours by Petitioners, who admittedly did not have probable cause, a warrant, exigent circumstances, or Respondent's consent.

Petitioners' seizure of S.G. was based on a report received by ODHS on or about February 19, 2003. S.G.'s father, Nimrod Greene, was arrested on February 12, 2003 for allegedly abusing another child, F.S., the seven-year-old son of a family that employed Greene. F.S.'s mother reported at this same time her concern that Greene might be abusing S.G.

Approximately four days after this report was made, Camreta and Alford went to S.G.'s elementary school and had her removed from her classroom. Alford was armed and in uniform at the time of the seizure. Petitioners isolated S.G. in a private room at the elementary school in order to question her. The questioning lasted for two hours. At the end of the

---

[2] Because the District Court granted summary judgment to Petitioners, Respondents' version of the facts is taken as true and all reasonable inferences are drawn in Respondents' favor. *See Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, 129 S. Ct. 846, 849 n. 1 (2009).

[3] S.G. and her younger sister, K.G., represented by their mother, are also Respondents.

questioning, S.G. finally told Petitioners what they wanted to hear – that Greene had abused her. Notwithstanding the seriousness of this revelation, Petitioners allowed S.G. to return home to her father.

On March 6, 2003, Greene was charged with abusing F.S. and S.G. He was shortly released and ordered not to have any contact with S.G. or her younger sister, K.G. On March 11, 2003, Camreta obtained a court order placing S.G. and K.G. in foster care, where they remained until March 31, 2003.

Given a lack of credible evidence that they had been abused, the court on March 31, 2003 returned S.G. and her sister to Respondent's custody. Greene was later tried for his alleged sexual abuse of F.S. and S.G., but was not convicted. When the jury could not reach a verdict, he pleaded guilty to a lesser charge based on the allegations involving F.S. Greene received no jail time. The charges involving S.G. were dismissed.

Respondent filed this action on behalf of herself and S.G. against Petitioners (in their individual capacities) under 42 U.S.C. § 1983, alleging, *inter alia*, that S.G.'s seizure and two-hour interrogation violated the Fourth Amendment. The District Court concluded that S.G. was seized, but concluded that it was reasonable within the meaning of the Fourth Amendment. On appeal, Petitioners conceded that S.G. had been seized. Contrary to the District Court's holding, the Ninth Circuit ruled that S.G.'s two-hour detention and interrogation, with the assistance of

law enforcement and without a warrant, violated the Fourth Amendment.

SUMMARY OF ARGUMENT

1. Petitioners conceded below that S.G.'s two-hour detention and interrogation by Petitioners was a seizure. The Court of Appeals relied on this concession to hold that Petitioners violated the Fourth Amendment. Petitioners cannot now change the question presented to this Court to seek an advisory opinion on whether S.G.'s seizure was simply justified "at its inception." A seizure's being justified "at its inception" does not mean that it satisfies the Fourth Amendment. This Court has held on a number of occasions that justifiable stops can mature with time or intrusion into unconstitutional seizures. *See, e.g., Florida v. Royer,* 460 U.S. 491 (1983). *Safford Unified School District No. 1 v. Redding,* 129 S. Ct. 2633 (2009), specifically ruled that a justifiable stop in school will demand more as it becomes more intrusive. Consequently, even if S.G.'s warrantless stop was justified at its inception (and consistent with the Fourth Amendment), its duration and intensity caused it to mature into an unconstitutional seizure.

2. History teaches that the Framers in the last quarter of the Eighteenth Century would not have countenanced government's meddling with America's families. They would not have allowed government officials to take children because of alleged abuse.

Simply put, the Founders did not consider raising and rearing children government's business. Warrantless rescues based on claimed abuse would therefore not have been tolerated. Nor did such a practice exist at the time the Fourteenth Amendment was adopted. Government's concern with child safety did not coalesce until the middle of the Twentieth Century. Indeed, the Nation's most recent protective efforts defined in terms of "dependency" and "neglect" did not emerge until the 1960s. By this time, the Fourth Amendment had been incorporated; it was understood that court orders and warrants were needed to separate children from their parents.

3. Seizures at the hands of law enforcement officers cannot be justified by "special needs." *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), is predicated on school authorities attempting to maintain discipline in schools. This Court has steadfastly refused to extend this "special needs" exception to criminal law enforcement. *See Ferguson v. City of Charleston*, 532 U.S. 67 (2001). Further, even if the seizure here were perpetrated by only protective service investigators, it would still fall beyond the pale of *T.L.O.* As made clear in *Redding*, some seizures are simply too invasive to rely only on reasonable suspicion. This is true of familial rights. America's right to family is one of the oldest and most basic of constitutional freedoms. It has routinely been afforded heightened procedural protection. *See, e.g., Stanley v. Illinois*, 405 U.S. 645 (1972). Children and families deserve the utmost constitutional protection.

4. Any distinction between the confines of "the home" and "other" places, *see, e.g., United States v. Watson,* 423 U.S. 411 (1976), does not control. Familial rights do not evaporate at a house's threshold. Although adults and juveniles can be arrested outside their homes without warrants, this does not mean that children can be taken into protective custody without warrants just because they are in their yards or at school. Dependency laws and delinquency laws have different histories. While warrantless arrests have historically been allowed outside homes, history has not recognized that children can be taken from parents under this same model. Further, because of reporting requirements, broad definitions and the lack of experienced investigators, the risk of error in rescuing children from alleged abuse is large. Arrests in public places for criminal behavior, though not always correct, are not routinely wrong, either. The opposite is true with removals, rescues and temporary seizures.

5. Petitioners have not demonstrated that the basic warrant process facilitates child abuse. They have produced no evidence showing that parents routinely refuse to cooperate in child abuse investigations. Nor have they shown that children in states that require warrants are subject to more abuse than those in states, like Oregon, that do not. Petitioners have not established that warrants are unworkable or place paralyzing costs on Oregon's protective services system. Petitioners have therefore failed to prove that

their alternative is absolutely necessary to protect children. They have not satisfied strict scrutiny.

ARGUMENT

I. S.G.'s Detention and Two-Hour Interrogation Was a Full Seizure Within the Meaning of the Fourth Amendment.

The meaning of "seizure" extends beyond formal arrests. Even in the absence of handcuffs and bookings, a person is seized by police if "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980).[4]

The Fourth Amendment, moreover, is not limited to criminal suspects and police investigations. It applies in civil settings, *see, e.g., Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978); *Immigration and Naturalization Service v. Delgado*, 466 U.S. 210 (1984), and restricts teachers' actions, *see, e.g., New Jersey v. T.L.O.*, 469 U.S. 325 (1985), as well as those of protective service investigators. *See, e.g., Doe v. Heck*, 327 F.3d 492, 510 (7th Cir. 2003). Whether a civil commitment, *see, e.g., Villanova v. Abrams*, 972 F.2d 792,

[4] Although Justice Stewart's formulation in *Mendenhall* only garnered plurality support, it has since been adopted by a majority. *See, e.g., Michigan v. Chesternut*, 486 U.S. 567, 573 (1988).

795 (7th Cir. 1992); *McCabe v. Life-Line Ambulance Service*, 77 F.3d 540 (1st Cir. 1996), arrest, *see, e.g., California v. Hodari D.*, 499 U.S. 621, 624 (1991), search within a public school, *see, e.g., Safford Unified School District No. 1 v. Redding*, 129 S. Ct. 2633 (2009), or removal from the home, *see, e.g., Wernecke v. Garcia*, 591 F.3d 386 (5th Cir. 2009); *cf. Reno v. Flores*, 507 U.S. 292, 317 (1993) (O'Connor, J., concurring) (observing that children "have a protected liberty interest in 'freedom from institutional restraints'"), the Fourth Amendment protects children.

Petitioners conceded below that S.G.'s detention and two-hour interrogation was a "seizure" within the meaning of the Fourth Amendment. The Ninth Circuit observed that "Camreta and Alford do not contest the district court's holding that *the two-hour interview* of S.G. at her school was a seizure. We agree . . . that it was." *Greene v. Camreta*, 588 F.3d 1011, 1022 (9th Cir. 2009) (emphasis added). The District Court, for its part, applied *Mendenhall*, 446 U.S. at 554, to conclude that, "in view of all of the circumstances surrounding the incident," *Greene v. Camreta*, No. 05-6047, 2006 WL 758547, at *3 (D. Ore. 2006), "S.G. was seized." *Id.* The issue framed by the Court of Appeals was therefore "relatively straightforward": "whether an in-school *seizure and interrogation* of a suspected child abuse victim *is always permissible* under the Fourth Amendment without probable cause and a warrant or the equivalent of a warrant, as defendants maintain." *Greene*, 588 F.3d at 1022 (emphasis added). The Ninth Circuit concluded that

warrantless seizures accompanied by lengthy interrogations in school settings are not "always permissible"; rather, when they involve police, lasts for two hours, and satisfy *Mendenhall*'s definition of a seizure, they are not. *Id.* at 1030.

Camreta argues that even though S.G. was fully seized – that is, even though S.G. was forcibly taken from her classroom and interrogated for two hours – Petitioners' actions were justified "at their inception" by reasonable suspicion. *See* Brief for Camreta at 38-40. The Ninth Circuit therefore was wrong in holding that S.G.'s two-hour ordeal violated the Fourth Amendment. There is no need Camreta argues, nor would it even be proper, to consider the length of S.G.'s detention and the circumstances under which she was interrogated. *See* Brief for Camreta at 40.

Camreta's argument ignores both the Fourth Amendment question put by Petitioners to this Court and Fourth Amendment jurisprudence. The Fourth Amendment question presented included no language limiting review to the validity of S.G.'s detention "at its inception." Petitioners broadly asked this Court to review whether the Ninth Circuit's Fourth Amendment holding was correct. In the absence of limiting language in their Petitions, and in light of the concessions below, the question presented here necessarily includes the totality of circumstances used by the District Court to find that S.G. did not reasonably feel free to leave within the meaning of *Mendenhall*.

Searches and seizures, of course, can be justified at their inception and still violate the Fourth Amendment. *See* 4 WAYNE LAFAVE, SEARCH AND SEIZURE § 9.2 (2010). A valid stop under *Terry v. Ohio*, 392 U.S. 1 (1968), for example, will mature into a Fourth Amendment violation if it lasts too long or becomes too invasive. *See, e.g., Florida v. Royer*, 460 U.S. 491 (1983). That a student is justifiably seized and searched under the logic of *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), does not mean that she can be forced to disrobe. *See Safford Unified School District No. 1 v. Redding*, 129 S. Ct. 2633 (2009). Here, the Ninth Circuit concluded that S.G.'s detention and two-hour interrogation by Petitioners under all the facts and circumstances violated the Fourth Amendment. There was no need for it to go back to assess whether S.G.'s stop was justified "at its inception."[5] Regardless of whether it was, what happened over the course of two hours violated the Fourth Amendment.[6]

* * *

---

[5] Camreta purposely confuses what is necessary with what is sufficient. Seizures necessarily must be justified at their inception to survive the Fourth Amendment. *See Mendenhall*. However, this does not mean all seizures that are initially justified are valid. *See Royer*.

[6] Camreta may not even have standing to make this "inception" argument before this Court. After all, success on this newly framed, limited issue would not alter the Ninth Circuit's ruling that S.G.'s two-hour seizure and interrogation violated the Fourth Amendment. It would afford them no relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

Petitioners argued below that warrantless seizures of students are *always permissible*. *See Greene*, 588 F.3d at 1022. The District Court agreed. The Court of Appeals reversed. The question before this Court is whether the Ninth Circuit was correct. Are warrantless seizures and interrogations of students based on mere suspicion *always permissible*? Are they permissible when they include two hours of questioning in the presence of law enforcement officers? *Amici* agree with Respondents that they are not.[7]

II. History Supports the Conclusion that Petitioners' Warrantless Seizure of S.G. Violated the Fourth Amendment.

At common law, "a peace officer was permitted to arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence if there was reasonable grounds for making the arrest." *United States v. Watson*, 423 U.S. 411, 418 (1976). This was also "the prevailing rule under state constitutions and statutes" when the Fourth Amendment was

[7] Note that the Ninth Circuit did not rule that all seizures of students must be accompanied by warrants. It did not decide whether brief, *Terry*-type stops of students require warrants (or even require cause greater than reasonable suspicion). It did not address whether lengthy interrogations by school authorities, or social workers in the absence of law enforcement assistance, require probable cause, let alone warrants.

adopted. *Id.* at 419. Because the Second Congress adopted this standard in the late Eighteenth Century and "plainly decided against conditioning warrantless arrest power on proof of exigent circumstances," *id.* at 423, this Court in *Watson* assumed that the Framers of the Fourth Amendment could not have meant to displace it. Warrantless felony arrests are thus generally acceptable under the Fourth Amendment – at least when they occur outside the home. *See Payton v. New York*, 445 U.S. 573, 588 (1980).

History is plainly important to the Constitution's meaning. If children were routinely being taken by government officials without warrants in the late Eighteenth Century, that would lend credence to the claim that the Fourth Amendment was not meant to prohibit these removals. The converse is also true; if children were not being taken by government officials at the Founding, with or without warrants, one could conclude that the Framers did not mean to authorize future warrantless seizures. Indeed, if familial rights were considered inviolate at the Founding, one could conclude that the Framers did not even consider warrantless seizures of allegedly neglected children a legal possibility.

Children of white, property-owning fathers (who formed the Nation's original political community) could not be taken by government officials at the Founding, with or without prior judicial authorization. Nor had such a practice emerged by the time the Fourteenth Amendment was adopted following the

Civil War. Taking children from parents because of "dependency," "neglect," or "abuse" is a modern development that emerged in the last quarter of the Twentieth Century. Further, this most modern reform effort, at its inception, assumed that warrants would be required. Only within the last generation have states, like Oregon, moved toward a summary removal model.[8] Petitioners essentially ask this Court to bless, for the first time, a "social worker exception to the strictures of the Fourth Amendment." *Walsh v. Erie County Department of Job and Family Services*, 240 F. Supp. 2d 731, 746-47 (N.D. Ohio 2003) (refusing to recognize this exemption).

A. Children in the Eighteenth and Nineteenth Centuries Could Not Be Summarily Taken From Their Parents By Government Officials.

1. Founding to Civil War

A father's right to the care, custody and control of his children is of ancient origin. Blackstone's Commentaries, published in 1765, observed that "'[t]he ancient Roman laws gave the father a power of life and death over his children; upon this principle, that

---

[8] Oregon law authorizes warrantless removals "[w]hen the child's condition or surroundings reasonably appear to be such as to jeopardize the child's welfare. . . ." OR. REV. STAT. § 419B.150(1)(a). As the present case demonstrates, Oregon officials also assume the authority to temporarily seize children without obtaining warrants.

he who gave had also the power of taking away. . . .'" Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEORGETOWN L.J. 299, 310 (2002) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *440). Blackstone observed that "children lived in 'the empire of the father' until they reached twenty-one," *id.* (citing BLACKSTONE at *441), and the father's common law "right to the custody, labor, and earnings of his minor children" was sacred. *Id.* at 310. Government therefore had little (if any) room to interfere with a father's right to raise his children.

Blackstone's common law deference to fathers, of course, did not abolish slavery. Nor did it override Elizabethan "Poor Laws" that were enacted following the disintegration of England's feudal age. *See* Douglas R. Rendleman, *Parens Patriae: From Chancery to the Juvenile Court*, 23 S. CAROLINA L. REV. 205, 210 (1971). Not only did Poor Laws allow the imprisonment of poor parents, *see Papachristou v. City of Jacksonville*, 405 U.S. 156, 161 n. 4 (1972) (describing the history behind "Elizabethan Poor Laws"); *Central Virginia Community College v. Katz*, 546 U.S. 356, 365 n. 4 (2006) (noting that England did not abolish imprisonment for debt until 1869), they authorized the removal of children from poor families. *See* Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status*, 16 STAN. L. REV. 257, 279 (1964). Children from poor families were impressed into the service of more prosperous families. *Id.*

The American Colonies received and recognized Blackstone's description of familial rights. They also, unfortunately, embraced England's Poor Laws, just as they recognized slavery. Church wardens and overseers in the Colonies took poor children from their homes and impressed them into the service of others. *See* Marvin Ventrell, *From Cause to Profession: The Development of Children Law and Practice*, 32-Jan. COLO. LAW. 65, 66 (2003); tenBroek, *supra*, at 279.

States in antebellum America – free from the constraints of the Fourth Amendment, *see Barron v. Mayor of City of Baltimore*, 32 U.S. 243 (1833) – continued this practice. During the "House of Refuge Movement" of the early Nineteenth Century, "delinquent" children were regularly snatched from streets and sent to institutions. *See* Janet Gilbert, Richard Grimm & John Parnham, *Applying Therapeutic Principles to a Family-Focused Juvenile Justice Model (Delinquency)*, 52 ALA. L. REV. 1153, 1158 (2001). The onslaught of immigration forced States to forego indentures in favor of reformatories and "houses of refuge." As an adjunct to "almshouses," which confined poor adults, these houses institutionalized poor children. *See* Ventrell, *supra*, at 66.[9]

---

[9] New York's law (enacted in 1824), for example, provided a charter to the Society for the Reformation of Juvenile Delinquents to erect a "House of Refuge" for minor vagrants, delinquents and criminals. *See* Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1190 (1971).

Their names notwithstanding, houses of refuge were not designed to shelter or protect children; "the undertaking was a matter of crime and delinquency protection, aimed at saving predelinquent youth." Sanford J. Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187, 1190-91 (1971). The Movement's essential thesis was that poverty correlated with "moral degeneracy." *Id.* at 1198. Removing poor children (and their parents) from the population-at-large ridded society of actual or potential moral deviants, offered correction and advanced crime control. *Id.* at 1207. It was no more benevolent or benign than slavery, which remained a facet of early American life.

2. Post-Civil War to Twentieth Century

Reform efforts geared toward protecting children – as opposed to protecting society from children – did not emerge until *after* the adoption of the Fourteenth Amendment. The genesis of this post-Civil War reform movement can be found in two celebrated child abuse cases tried in New York City in 1871 and 1874, respectively. *See* Ventrell, *supra*, at 66 (discussing cases involving Emily (1871) and Mary Ellen (1874)). Both cases involved children who had been abused by their parents or guardians. Henry Bergh, the founder of New York's Society for the Prevention of Cruelty to Animals, used "a writ de homine replegiando (similar to a writ of habeas corpus), . . . to remove the girls and ultimately have them placed by the New York Special Sessions Court in safe care. It is

not clear under what authority the court acted; it probably saw itself as exercising its equitable authority, having taken criminal jurisdiction over the abusers." *Id.* These two cases spawned the creation of the New York Society for the Prevention of Cruelty to Children in 1874. *Id.*

In the years that followed, more communities followed suit. "Led by their wealthy private philanthropists, [these societies] amassed unprecedented legal authority to scrutinize parental behavior, arrest parents, and remove thousands of children." Hasday, *supra*, at 302. Most often, society agents simply "followed children back to their homes," *id.* at 307, arrested their parents and seized the children. *Id.* Because removals were parcel to the arrests of the parents, they occurred without prior or accompanying judicial process. Process came, if at all, as part of the subsequent criminal proceedings against the parents.[10] Even though the New York Reform Movement's mandate ostensibly was protection, it continued to labor under a distinction between rich and poor.

---

[10] "Once a child had been removed from her parents at the New York society's instigation or with its help," moreover, "the courts were extremely reluctant to allow visitation or to release the child, unless the society agreed." *Id.* at 308. In twenty years (1881-1900), the New York society brought "52,860 criminal cases, resulting in 49,330 convictions (a 93.3% success rate). During the same period, the society removed 90,078 children with judicial approval. It exercised enormous discretion over their placement, and put the overwhelming majority in institutions." *Id.* at 307-08.

"From the start, [the New York Society] focused on families that had not been successful in the wage labor economy, operating on the principle that this economic failure had been caused by some crucial moral or character flaw." Hasday, *supra*, at 304-05.

Despite Elizabethan Poor Laws, the House of Refuge Movement, and Henry Bergh's private efforts in New York,[11] "[o]ver the entire course of the nineteenth century, common law courts and legal writers in the United States remained highly respectful of the control that parents, particularly fathers, exercised over their households and children, and *committed to doctrines that made legal intervention to counter parental excess or abuse very unlikely*." *Id.* at 311 (emphasis added). Even though slavery and Poor Laws co-existed with these protective doctrines, the understood rule was clear and inviolate: children simply could not be taken with or without warrants from citizens who formed America's political community.

---

[11] At the close of the Nineteenth Century, Bergh's movement ceded control to state and local administrative bodies. *See* Howard A. Davidson, *Child Protection Policy and Practice at Century's End*, 33 FAM. L.Q. 765, 766 (1999).

B. Twentieth-Century Reform Efforts Established Governmental Programs to Address Neglected and Abandoned Children.

In the first quarter of the Twentieth Century, several States passed "mothers' pension laws." *See* Hasday, *supra*, at 348. These laws

> authorized local governments to provide direct financial support to poor mothers, [and] differed from the child cruelty societies in two important institutional respects. . . . First, [they] established completely governmental programs. . . . Second, and more crucially, [they] primarily accomplished their aims through the provision and refusal of much needed financial aid, building on a growing consensus among reformers of the period that this strategy was both more effective, and more cost-efficient, than removing children from their parents' custody.

Id. By mid-Century "all states had government agencies that provided statewide services to abused, neglected, and abandoned children." Davidson, *supra*, at 767. This was fueled by federal spending measures, such as the Aid to Dependent Children Act, which was passed as part of the Social Security Act of 1935. *See* Hasday, *supra*, at 357.

The medical community took note of what modern Americans now know to be "child abuse" in 1946, when Dr. John Caffey reported the case histories of six "battered" children. *See* Harold A. Richman, *From*

a Radiologist's Judgment to Public Policy on Child Abuse and Neglect: What Have We Wrought?, 30 PEDIATRIC RADIOLOGY 219, 220 (2000). The dialogue that followed "began the modern era in our understanding of child abuse and our response to it." *Id.* In 1961, the American Academy of Pediatrics organized its first conference on "The Battered Child Syndrome." *Id.* The first model child abuse law was drafted at this conference. *Id.* The following year, a report by the same name was published in the Journal of the American Medical Association. *Id.* It "brought the problem [of child abuse] to a wider audience, not only in medicine but in government as well. . . ." *Id.* By 1966, "every state in the Union passed a child-abuse reporting law." *Id.*[12]

Once abuse laws and reporting requirements were in place, the problem turned to process: how could local authorities respond to reported instances of abuse? Should children be followed home and kidnapped following the arrest of their parents, as was true with the private societies that emerged in the last quarter of the Nineteenth Century? Should

---

[12] In 1974, Congress enacted the Child Abuse Prevention and Treatment Act (CAPTA), Pub. L. No. 93-247, 88 Stat. 4 (1974), which marked "its first direct action to address child maltreatment within the home. . . ." Davidson, *supra* note 13, at 776. In 1980 and 1997, Congress passed additional spending measures, the Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272, 94 Stat. 500 (1980), and the Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997), respectively. It has never addressed the problem presented here.

discretion be left with church wardens and overseers to indenture children, as was true in the late Eighteenth Century?

While the first half of the Twentieth Century saw little change in the procedures that accompanied the institutionalization of children (and incarceration of adults), the incorporation of the Bill of Rights – in particular, the full application of the Fourth Amendment to state and local activities, *see, e.g., Mapp v. Ohio*, 367 U.S. 643 (1961) – caused dramatic procedural changes throughout the States in the second half of the Century. Before 1967, juveniles were commonly subjected to detention without procedural protections. *See In re Gault*, 387 U.S. 1, 11 n. 7 (1967). As explained in *Gault*, 387 U.S. at 15, "[t]he early reformers were appalled by adult procedures and penalties, and by the fact that children could be given long prison sentences and mixed in jail with hardened criminals." These early reformers thus discarded the "apparent rigidities, technicalities, and harshness which they observed in both substantive and procedural criminal law" for juvenile delinquents. *Id.* They left juveniles with promises of compassion and fairness as opposed to process.

The Court in *Gault*, 387 U.S. at 18, rightly saw through this guise: "Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." The Court reminded modern Americans of what the Founders knew well –

governmental claims of compassion and protection are "poor substitute[s] for principle and procedure."

Following *Gault*'s landmark holding, the National Conference of Commissioners on Uniform State Laws presented its recommendation for implementing the changes needed to America's juvenile justice system in 1968. The result was the Uniform Juvenile Court Act of 1968 ("the Model Juvenile Court Act" or "Model Act"); this model law purported to implement changes needed in America's juvenile justice system to comply with the Constitution. It distinguished between procedures that should be followed with dependent children and those that should be followed with delinquents: a child could only be "taken into custody" "pursuant to an order of the court under this Act," Model Juvenile Court Act, § 13(a)(1), 9A U.L.A. 22 (1968), or "pursuant to the laws of arrest." *Id.* § 13(a)(2).

The Model Act provided exceptions for a "child [ ] suffering from illness or injury or [ ] in immediate danger from his surroundings," as well as a child who "has run away from his parents, guardian, or other custodian." *Id.* § 13(a)(3) & (4). Even then the Model Act required that the child be immediately returned to its parents "upon their promise to bring the child before the court when requested," *id.*, § 15(a)(1), unless the child's parents presented a flight risk. *Id.* § 14. The Model Act expressed a clear preference for prior judicial involvement and supervision in dependency and abuse proceedings. Unilateral, summary seizures were only permissible in emergencies, and

even then the Model Act required the immediate return of children to their parents.

* * *

Three important conclusions can be drawn from this historical outline: First, the Framers would not have countenanced government's meddling with families. Never would they have allowed governmental agents to take their children because of alleged "abuse." Simply put, the Founders did not consider raising and rearing children government's business. Warrantless rescue based on claimed abuse was not tolerated.

Second, the Drafters of the Fourteenth Amendment would not have tolerated governmental interference. Private concerns over "child abuse" did not arise until after the Civil War. Government did not embrace this end until the beginning of the Twentieth Century. When this happened, government officials were not yet constrained by federal constitutional norms. As a constitutional matter, local authorities during the first half of the Century were free to exercise "unbridled license" over children – and they did (as noted in *Gault*).

Third, the most modern reform effort – which vastly expanded notions of abuse, neglect and dependence – emerged with knowledge of the constraints of the Fourth and Fourteenth Amendments. The Model Act of 1968 followed on the heels of *Gault* and codified this Court's post-incorporation holdings. As a result, the Model Act stated that children cannot

be taken "into custody" without court orders. Society's most recent "child protection" system was predicated on this assumption. By 1968, it was clear that children could not be routinely taken from their parents without judicial authorization.

III. No Recognized Exception Justifies Dispensing With Warrants When Seizing Children.

Circumstances sometimes excuse compliance with the Fourth Amendment's warrant requirement. "Closely regulated" businesses and industries, for example, are not protected from warrantless searches. *See, e.g., New York v. Burger*, 482 U.S. 691 (1987). Today, these exceptions to the Fourth Amendment's probable cause and warrant requirements are described as "special needs." Critical to this exception is the intersection of a diminished expectation of privacy and a governmental objective "other than the normal need for law enforcement." *Ferguson v. City of Charleston*, 532 U.S. 67, 75 n. 7 (2001). Where individual expectations of privacy are high, this exception rarely applies. And where government uses crime-control laws as leverage, or employs criminal law enforcement personnel, it must fully comply with the Fourth Amendment's basic requirements.

A. *T.L.O.* Does Not Control.

Because the seizure in the present case occurred at S.G.'s school, Petitioners argue that *New Jersey v.*

T.L.O., 469 U.S. 325 (1985), controls. The Court's holding there, however, was premised not on the student's mere presence in the school; rather, the Court relied on the fact that the *school authorities* conducted the search to maintain *school discipline*. *T.L.O.* cannot be read to award protective service investigators and police officers similar authority simply because a child is temporarily on school property.

T.L.O., like all special needs cases, made clear that it was not to be read broadly. "Special needs" does not mean law enforcement. For example, while governmental agents are subject to warrantless (even suspicionless) drug testing, *see Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989); *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989); and students who participate in extra-curricular activities can likewise be tested, *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002), the great majority of America's citizenry remains protected by the Fourth Amendment's warrant requirement. *See, e.g., Schmerber v. California*, 384 U.S. 757, 771-72 (1966). The Court in *Earls* emphasized that the testing program at issue was "not in any way related to the conduct of criminal investigations. . . ." *Id.* at 829. The test results were "not turned over to any law enforcement authority," nor would they "lead to the imposition of discipline or have any academic consequences." *Id.* at 833. The school district's concern was

simply "detecting and preventing drug use among its students." *Id.* at 825.

Ferguson v. City of Charleston, 532 U.S. 67 (2001), stands in stark contrast to *Earls* and the exception it represents. *Ferguson* addressed a public hospital's use of drug testing to deter pregnant women from using crack cocaine. Urine screens were performed on maternity patients and test results were used to leverage patients into formal treatment programs. *Id.* at 72. Those who refused were referred to law enforcement officials for prosecution. *Id.* at 72-73. Potential charges included child neglect and unlawful delivery of a controlled substance to a child. *Id.*

Because the program was not "divorced from the State's interest in law enforcement," *id.* at 79, but instead used "law enforcement to coerce the patients into substance abuse treatment," *id.* at 80, the Court concluded that it did not qualify for treatment under the special needs exception. Even though the hospital's "benign" motives included protecting children, *id.* at 85, concededly "a serious problem," *id.* at 86, the program's "pervasive involvement" with law enforcement rendered it unqualified for the special needs exception. "[T]he gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." *Id.* at 86. As pointed out by Justice Kennedy, 532 U.S. at 88 (Kennedy, J., concurring): "None of [the Court's] special needs precedents has sanctioned the routine inclusion of law enforcement

. . . to implement the system designed for the special needs objectives."

B. Familial Privacy Is Fundamental.

Even assuming that the present case were divorced from law enforcement, the special needs exception would still not apply. S.G.'s seizure and interrogation were too intrusive. The Court ruled in *Safford Unified School District No. 1 v. Redding*, 129 S. Ct. 2633 (2009), that students suspected of violating school rules could not be strip-searched pursuant to *T.L.O.*'s reasonable suspicion standard, even though the school was attempting to maintain order and police were not involved. The "patent intrusiveness" of such a search, 129 S. Ct. at 2641, the Court concluded, demanded "distinct elements of justification." *Id. Redding* makes clear that individual privacy concerns sometimes overcome relaxed special needs standards. Searching a purse is one thing, *see T.L.O.*; stripping a student is another. *See Redding*.[13]

Payton v. New York, 445 U.S. 573, 588 (1980), likewise ruled that fundamental privacy interests cannot be trusted to executive license. *Watson*, of course, had ruled that arrests outside the home could proceed without warrants because historically that

[13] Indeed, some bodily intrusions are so invasive that they are not allowed to proceed even when police have fully complied with the Fourth Amendment's terms and obtained a warrant. *See, e.g., Winston v. Lee*, 470 U.S. 753, 766 (1985).

was the rule. But this was also the common law rule for felony arrests inside the home. *See Payton,* 445 U.S. at 616 (White, J., dissenting). Still, the Court rejected this historical argument in favor of protecting privacy: "an entry to arrest and an entry to search for and to seize property implicate the same interest in preserving the privacy and the sanctity of the home, and justify the same level of constitutional protection." *Id.* at 588.

This same rationale applies to familial privacy – inside and outside the home. One's right to family cannot depend on location. It follows the family. Lengthy seizures and interrogations of young children about sexual matters and family intimacies jeopardize familial privacy whether conducted inside or outside the home. The magnitude of these invasions is not just spatial, it is, as explained in *Redding,* physical, emotional and psychological. An interrogation of this nature may very well forever define the family. Its impact not only falls on "the family's view of itself," but also "on the view of the family held by those consulted in the investigation[.]" Richman, *supra,* at 223.

This Court has long recognized a basic, fundamental right to raise children. *See Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). In *Troxel v. Granville*, 530 U.S. 57, 66 (2000), the Court stated that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care,

custody, and control of their children." These rights, the Court observed, are "perhaps the oldest of fundamental liberty interests recognized by this Court." *Id.* at 65.

Heightened procedural protections, moreover, have routinely been extended to families. In *Stanley v. Illinois*, 405 U.S. 645 (1972), for example, the Court ruled that a father (as well as a mother) "as a matter of due process" is "entitled to a hearing on his fitness as a parent *before* his children were taken from him. . . ." *Id.* at 647. This logic naturally extends to both temporary and permanent takings: "Surely, . . . if there is delay between the doing and the undoing petitioner suffers from the deprivation of his children, and *the children suffer from uncertainty and dislocation.*" *Id.* (emphasis added). *See also Lassiter v. Department of Social Services*, 452 U.S. 18 (1981); *Santosky v. Kramer*, 455 U.S. 745 (1982); *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996).

C. *Lidster's* Focus Was Brief Encounters.

Recognizing the strained analogy to *T.L.O.* and other special needs precedents, Petitioners rely on *Illinois v. Lidster*, 540 U.S. 419 (2004), for support. There, the Court approved brief stops of motorists at highway checkpoints in order to elicit information about a crime that had occurred in the vicinity. *Lidster* hardly helps Petitioners' case. The Court in *Lidster* repeatedly relied on the brevity of the stops to support their validity. *See, e.g.*, 540 U.S. at 424

(distinguishing the case as involving "brief, information-seeking highway stops"). They were not designed to last more than a few minutes. The Court did not hold that law enforcement officers may seize adults (let alone young children) without probable cause in order to engage in hours-long questioning. *Lidster*, moreover, hinged on information-seeking stops in non-coercive and non-invasive environments. *Id.* at 425 ("information-seeking highway stops are less likely to provoke anxiety or to prove intrusive"). Here, S.G., a nine-year-old girl, was moved, isolated and interrogated for two hours. Her seizure was far from a brief, casual, information-seeking stop.

IV. Familial Rights Do Not Evaporate at the Home's Threshold.

Ignoring familial rights' long pedigree, the Solicitor General argues that parents and children do not enjoy the protections envisioned by warrants when they are outside their homes. *See* Brief for the United States at 22. After all, the Solicitor General notes, the Fourth Amendment allows arrests outside the home without warrants. *Id.*

The Solicitor General is correct; juveniles can be *arrested* without warrants under the logic of *Watson* when they are outside their homes. But this does not mean that young toddlers and children of tender years can be summarily snatched from sidewalks and schools. It cannot mean that government agents can constitutionally wait at the curb for school-age

children to emerge, and then spirit them away for incommunicado interrogation. If this were the case, then the constitutional right to "family" would mean nothing more than the right to stay home.

As the framers of the Model Act of 1968 well knew, removal and arrest are different. They developed along different historical paths. They advance different ends. Delinquent children and dependent children, in short, are different.

"Juvenile delinquents" present a small class of children. This class is necessarily limited to minors who have matured beyond tender years; young children simply cannot commit crimes or be delinquent. Further, Due Process demands that criminal statutes be clear, *see, e.g., Skilling v. United States,* 130 S. Ct. 2896 (2010), and focus on action rather than mere status.[14] *See, e.g., Robinson v. California,* 370 U.S. 660 (1962).

In contrast, the class of potentially "dependent" children is huge. It encompasses all children in America. Infants, toddlers and young school-age children, like S.G., are all potential targets. This vast universe of potential "status" victims, coupled with mandatory reporting requirements, vague understandings of

[14] Although criminal laws sometimes punish inaction when a duty is present, the vast majority focus on voluntary acts. *See* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 6.2 (2010). This further limits the scope of the net cast by *Watson's* law of arrest and increases the accuracy rate.

"neglect," and undertrained investigators produces a significant error rate within the child protection system. Harold Richman, Director of the Chapin Hall Center for Children at the University of Chicago, lamented ten years ago that the definition of child abuse has "greatly expanded" since the early 1960s, bringing in a large percentage of cases that fall into a "troublesome" gray area.[15] Richman, *supra,* at 221. Simple neglect and emotional maltreatment, Richman explains, "account for almost 60% of all maltreatment." *Id.*[16] The "most startling fact about child-abuse reporting numbers, beyond their size," Richman reported in 2000, "is that most of the reports remain unsubstantiated – that is, they are not substantiated after caseworker investigation." *Id.* at 223.

---

[15] Howard Davidson, Director of the American Bar Association's Center on Children and the Law, has echoed this point: "[a] single incident of a child seemingly left unattended by parental or adult supervision, or when, in an instant, a parent has 'lost their cool' and hit their child, are frequent bases for making reports that cause full-scale . . . investigations." Davidson, *supra,* at 774. "By far," Davidson has noted, "the majority of reports of child maltreatment do not allege that children are in serious and imminent danger. . . ." *Id.* Davidson therefore concludes that "it is time to seriously consider changes in the fundamental ways in which child abuse and neglect are defined and responded to." *Id.*

[16] "Friends, neighbors, and relatives" are responsible for just under one-half of these reports. *See* the United States Department of Health and Human Services Administration for Children and Families, Appendix G: Highlights of Child Maltreatment 2003, http://www.acf.hhs.gov/programs/cb/pubs/cwo03/appendix/appendixg.htm (last visited January 4, 2011).

On average, "60% to 65% of [the] cases [are] *not substantiated*." *Id.* (emphasis added). Even after initial screening and investigation, this preponderance of misinformation has still translated into an unacceptably large percentage of false positives. One authority estimates the percentage of wrongful rescues and removals (not counting temporary seizures, as here) at over 33%. Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protection Proceedings*, 42 FAM. CT. REV. 540, 541 (2004).

Third, protective service investigators are not experts. "In most states, a bachelor's degree in any subject is all that is required to become a public child protective service (CPS) caseworker." Howard A. Davidson, *Child Protection Policy and Practice at Century's End*, 33 FAM. L.Q. 765, 772 (1999). "After hiring, CPS pre-service training is too often minimal. Pay scales are often very low, morale is frequently poor, and staff turnover is constant." *Id.*

Crime control and dependency are, for all of these reasons, quite different. Extending the distinction between home and public to protective service caseworkers risks, to put it bluntly, disaster. Large numbers of innocent children will be swept into the net of false positives. Families will be destroyed. At bare minimum, any claim *Watson*'s distinction is necessary to protect children must be seriously questioned. It may harm as many children as it helps.

V. Summary Seizures Are Not Necessary to Achieve a Compelling Interest.

The Fourth Amendment's warrant requirement does not facilitate child abuse. It does not prevent protective service investigators and law enforcement officials from investigating, nor does it stop teachers from questioning children once inside their schools. It simply injects a judicial, neutral decision-maker between executive license and familial integrity. Before government reaches beyond teaching and begins investigating, it should obtain a warrant.

The Fourth Amendment's warrant requirement simply demands that, in the absence of exigent circumstances,[17] *see Mincey v. Arizona*, 437 U.S. 385, 394 (1978), government officials obtain authorization from a neutral, detached magistrate before seizing children. It injects objective decision-making between government's unbridled discretion and familial integrity. If a judge or magistrate agrees, *ex parte*, that probable cause exists to believe a child is, has been, or will be abused, the child can be seized and questioned. *See Newton v. Burgin*, 414 U.S. 1139 (1974). If not, the child and her family are protected from

---

[17] In the present case, time and exigencies were never a problem. As pointed out by the Court of Appeals, Petitioners had several days to seek a warrant. 588 F.3d at 1030 n. 17. Petitioners allowed S.G. to return to her home. Warrants, of course, can be obtained telephonically, *see, e.g., Kalmanson v. Lockett*, 848 So.2d 374, 379 (Fla. App. 2003), and protective service investigators accordingly enjoy a large measure of flexibility.

unauthorized and unnecessary intrusions. Children are protected on both sides of the divide.

Petitioners and their *amici* have presented no empirical evidence to support the charge that warrants impede protective services. This Court in *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 316 (1978), rejected a similar claim by federal inspectors: "We are unconvinced . . . that requiring warrants to inspect will impose serious burdens on the inspection system or the courts, will prevent inspections necessary to enforce the statute, or will make them less effective." In the absence of "any widespread pattern of refusal," *id.*, the Court properly assumed that "the great majority . . . can be expected in normal course to consent to inspection without warrant." *Id.*

Because Petitioners here present no evidence of a "widespread pattern of refusal" on the part of uncooperative parents, nor is there any evidence of widespread investigative failures caused by warrants, Petitioners' claims must be taken with a large grain of salt. Many states continue to operate child abuse systems requiring warrants,[18] yet Petitioners have

---

[18] *See, e.g.*, ALA. CODE § 12-15-125(a) (requiring prior judicial authorization except when immediate removal is "necessary"), ARIZ. REV. STAT. §§ 8-303 & 8-821 (same); GA. CODE ANN. § 15-11-45 (same); N.D. CENT. CODE § 27-20-13 (same); PA. CONSOL. STAT. ANN. § 6324 (same); WIS. STAT. § 48.19(d) (same). *See generally* Mark R. Brown, *Rescuing Children from Abusive Parents: The Constitutional Value of Pre-Deprivation Process*, 65 OHIO ST. L.J. 913, 915-19 (2004).

pointed to no comparative data demonstrating abuse in these states is higher (or lower). There is absolutely no suggestion of any correlation between States' requiring warrants and increased child abuse.

Petitioners effectively admit here that they did not have probable cause to seize S.G.[19] "Hence," the argument goes, "we could not have investigated allegations against S.G.'s father if we were required to obtain a warrant." Of course, no one knows whether Petitioners could have obtained a warrant here, since they never asked.[20] Notwithstanding their concession, it is by no means clear that investigators in similar situations must necessarily be denied warrants. Under *Illinois v. Gates*, 462 U.S. 213 (1983), courts look to the totality of circumstances in order to assess probable cause.[21] Probable cause, like reasonable suspicion, is a "fluid concept." *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001). "[O]ne determination will seldom be a useful

---

[19] Although Alford claimed in the Court of Appeals that he had probable cause to seize S.G., *see* Ninth Circuit Brief for Alford at pp. 26-28, he has not in this Court. Instead, his (and Camreta's) position is that reasonable suspicion should suffice. Camreta has never claimed probable cause existed.

[20] There was no finding below that Petitioners did not have probable cause. The Court of Appeals ruled only that "applying the traditional Fourth Amendment requirements, the decision to seize and interrogate S.G. in the absence of a warrant, a court order, exigent circumstances, or parental consent was unconstitutional." 588 F.3d at 1030 (footnotes omitted).

[21] In civil settings this standard may be relaxed. *See, e.g., Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978).

'precedent' for another.'" *Ornelas v. United States*, 517 U.S. 690, 698 (1996).

Petitioners' demand for a lower standard is premised less on a desire to protect children than to win unbridled discretion. History teaches, however, that license breeds abuse. *See, e.g., Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (warning that "virtually complete discretion in the hands of the police" cannot be tolerated); *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1983). History teaches that "unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure." *Gault*, 387 U.S. at 18.

The Fourth Amendment's warrant requirement reduces abuse by minimizing errors. *See* William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 891 (1991); William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 848 (2001); Alexander A. Reinert, *Public Interest(s) and Fourth Amendment Enforcement*, 2010 U. ILL. L. REV. 1461, 1493. Filtering child abuse reports through neutral magistrates is even more productive in the protective services context, because social workers tend to be less trained, *see* Davidson, *supra*, at 772, and more immune than police. *See, e.g., Johnson v. Sackett*, 793 So.2d 20, 24 (Fla. App. 2001) (holding that social workers have absolute immunity under state law); *Hoffman v. Harris*, 511 U.S. 1060 (1994) (Thomas, J., dissenting from denial of certiorari)

(discussing federal immunities available to social workers). Under circumstances like these, requiring antecedent warrants is very likely the only effective deterrent. *See* Stuntz, *Warrants and Fourth Amendment Remedies*, *supra*, at 909.

CONCLUSION

Should the Court determine that review remains appropriate in this case, the Court of Appeals' conclusion that S.G.'s two-hour seizure and interrogation violated the Fourth Amendment should be affirmed.

Respectfully submitted,

MARK R. BROWN
Counsel of Record
303 E. Broad Street
Columbus, Ohio 43215
(614) 236-6590
mbrown@law.capital.edu

FILED
DEC 16 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BOB CAMRETA,
Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,
Respondents.

JAMES ALFORD, Deschutes County Deputy Sheriff,
Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR THE NATIONAL ASSOCIATION OF SOCIAL WORKERS AND THE OREGON CHAPTER OF THE NATIONAL ASSOCIATION OF SOCIAL WORKERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

MARY M. CALKINS *
GEORGE E. QUILLIN
FOLEY & LARDNER LLP
3000 K St., NW, Suite 500
Washington, D.C. 20007-5143
(202) 672-5300
mcalkins@foley.com

* Counsel of Record — *Counsel for the Amici Curiae*

[Additional Counsel Listed On Inside Cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

458h
45

CAROLYN I. POLOWY
SHERRI MORGAN
NATIONAL ASSOCIATION OF SOCIAL WORKERS
750 First St. NE, Suite 700
Washington, D.C. 20002
(202) 336-8282
SMorgan@naswdc.org

Counsel for the Amici Curiae,
National Association of Social Workers
and the Oregon Chapter of the National
Association of Social Workers

TABLE OF CONTENTS

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 4

ARGUMENT 6

I. THE NINTH CIRCUIT'S REQUIREMENT OF PROBABLE CAUSE OR PARENTAL CONSENT DISREGARDS AND UNDERMINES THE PRIMARY PURPOSE OF FEDERAL AND STATE CHILD ABUSE LAWS: PROTECTING CHILDREN 6

A. CAPTA and Oregon's Resulting Laws Support a Protective, Rather Than Prosecutorial, Purpose 8

B. The Ninth Circuit's Requirements, If Allowed to Stand, Would Make It Much Harder For States to Protect Children From Abuse, Particularly Sexual Abuse 14

C. The Ninth Circuit's Requirements Also Hamper States' Abilities to Develop and Implement Best Practices and Guidelines For Protecting Children 19

D. The Ninth Circuit Decision Should Be Overturned as Contrary to Legislative Intent and Potentially Harmful to Children 22

II. UNDER THE REASONABLENESS BALANCING STANDARD APPROPRIATE FOR WITNESS INTERVIEWS, CHILD INTERVIEWS OF THE TYPE AT ISSUE HERE ARE REASONABLE 23

A. The Reasonableness Balancing Standard For Witnesses Properly Focuses Upon Protecting the Child 23

B. Child Assessment Interviews Having the Characteristics of the Interview At Issue Are Reasonable 25

1. Interviewing a Child Outside the Presence of Her Parent Is Reasonable 25

2. Having Multiple Professionals Present at a Single Interview of a Child Is Reasonable 26

3. Interviewing a Child at School Is Reasonable 30

CONCLUSION 33

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS

U.S. CONST. amend. IV 5

FEDERAL STATUTES

Child Abuse Prevention and Treatment Act (CAPTA), Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. §§ 5101 *et seq.* & §§ 5116 *et seq.* (2010)) ..... passim

Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36, 117 Stat. 800-831 (2003) 8

STATE STATUTES

23 PA. CONS. STAT. § 6311(a) (2007) 3

325 ILL. COMP. STAT. ANN. 5/4 (2008) 3

ALA. CODE § 26-14-3(a) (2003) 3

ALASKA STAT. § 47.17.020(a) (2008) 3

ARIZ. REV. STAT. ANN. § 13-3620(A) & (C) (2003) 3

ARK. CODE ANN. § 12-12-507(b)-(c) (2009) 3

CAL. PENAL CODE § 11165.7(a)(15) (2010) 3

COLO. REV. STAT. ANN. § 19-3-304(1), (2), (2.5) (2008) 3

CONN. GEN. STAT. ANN. § 17a-101(b) (2002) 3

D.C. CODE § 4-1321.02 (2009) 3

DEL. CODE ANN. tit. 16, § 903 (2008) 3

FLA. STAT. ANN. § 39.201(1) (2008) 3

GA. CODE ANN. § 19-7-5(c) (2008) 3

HAW. REV. STAT. § 350-1.1 (2010) 3

IDAHO CODE § 16-1605 (1) (2010) 3

IND. CODE § 31-33-5(1)-(2) (2010) 3

IOWA CODE ANN. § 232.69 (2008) 3

KAN. STAT. ANN. § 38-2223 (2006) 3

KY. REV. STAT. ANN. § 620.030(1)-(2) (2008) 3

LA. CHILD. CODE ANN. art. 603(15) (2008) 3

MASS. GEN. LAWS. ANN. ch. 119, § 51A (2007) 3

MD. CODE ANN. FAM. LAW § 5-704(a) (2010) 3

ME. REV. STAT. ANN. tit. 22, § 4011-A(1) (2008) 3

MICH. COMP. LAWS § 722.633 (2010) 3

MINN. STAT. § 626.556 (2010) 3

MISS. CODE ANN. § 43-21-353 (2007) 3

MO. ANN. STAT. § 210.115(1) (2010) 3

MONT. CODE ANN. § 41-3-201 (2007) 3

N.C. GEN. STAT. § 7B-301 (2005) 3

N.D. CENT. CODE § 50-25.1-03 (2007) 3

N.H. REV. STAT. ANN. § 169-C:29 (2009) 3

N.J. STAT. ANN. § 9:6-8.10 (2009) 3

N.M. STAT. ANN. § 32A-4-3(A) (2005) 3

N.Y. SOC. SERV. LAW § 413(1) (2008) 3

NEB. REV. STAT. ANN. § 28-711(1) (2008) 3

NEV. REV. STAT. ANN. § 432B.220 (2008) 3

OHIO REV. CODE ANN. § 2151.421 (2008) 3

OKLA. STAT. tit. 10A, § 1-2-101 (2009) 3

OR. REV. STAT. § 419B.007 (2009) 12

OR. REV. STAT. § 419B.010 (2009) 3, 12

R.I. GEN. LAWS § 40-11-3(a) (2008) 3

S.C. CODE ANN. § 63-7-310 (2007) 3

S.D. CODIFIED LAWS § 26-8A-3 (2008) 3

TENN. CODE ANN. § 37-1-403 (2008) 3

TEX. FAM. CODE ANN. § 261.101 (2007) 3

UTAH CODE ANN. § 62A-4a-403 (2008) 3

VA. CODE. ANN. § 63.2-1509 (2009) 3

VT. STAT. ANN. tit. 33, § 4913 (2007) 3

W. VA. CODE § 49-6A-2 (2006) 3

WASH. REV. CODE. ANN. § 26.44.030 (2007) 3

WIS. STAT. § 48.981(2)(a) (2010) 3

WYO. STAT. ANN. § 14-3-205 (2007) 3

RULES

OR. ADMIN. R. 413-015-0100 (2010) 13

OR. ADMIN. R. 413-015-0105 (2010) 13

OR. ADMIN. R. 413-015-0205 (2010) 12

OR. ADMIN. R. 413-015-0210 (2010) 12, 13, 17, 18

OR. ADMIN. R. 413-015-0415 (2010) 19

OR. ADMIN. R. 413-015-0420 (2010) 13, 19

CASES

Kennedy v. Louisiana,
128 S. Ct. 2641 (2008) 16, 28, 30

LEGISLATIVE MATERIALS

H.R. Rep. No. 108-26 (2003),
reprinted in 2003 WL 881120 ..... passim

S. Rep. No. 108-12 (2003),
reprinted in 2003 WL 881123 ..... 9, 17

Testimony of Caren Kaplan, MSW, Dir. of Child Prot. Reform, Am. Humane Ass'n, Before the U.S. House Comm. on Educ. & Labor's Subcomm. on Healthy Families & Cmtys., *Preventing Child Abuse and Improving Responses to Families in Crisis* (Nov. 5, 2009), *available at* http://edlabor.house.gov/documents/111/pdf/testimony/20091105CarenKaplanTestimony.pdf 7

BOOKS, PAMPHLETS, AND PRINTED PUBLICATIONS

A.J. Sedlak et al., *Fourth National Incidence Study of Child Abuse and Neglect (NIS-4): Report to Congress*, U.S. Dep't of Health & Human Servs., Admin. for Children & Families (2010), *available at* http://www.acf.hhs.gov/programs/opre/abuse_neglect/natl_incid/nis4_report_congress_full_pdf_jan2010.pdf 15

Am. Prof'l Soc. on the Abuse of Children, *Practice Guidelines: Investigative Interviewing in Cases of Alleged Child Abuse* (2002).....passim

Child Welfare League of Am., et al., *Workforce Recruitment and Retention in Child Welfare: A Review of the Literature* (2005) 18

Ctr. for Improvement of Child & Family Servs., Portland State Univ., Sch. of Soc. Work, *Reducing the Trauma of Investigation, Removal, and Initial Out-of-Home Placement in Child Abuse Cases* (2009), *available at*

http://www.ocfs.state.ny.us/main/cfsr/Reducing%20the%20trauma%20of%20investigation%20removal%20%20initial%20out-of-home%20plcaement%20in%20child%20abuse%20cases.pdf .....passim

G. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims* (1992) 28

Jill Goldman et al., *A Coordinated Response to Child Abuse and Neglect: A Foundation for Practice*, U.S. Dep't of Health & Human Servs. (2003), *available at* http://www.childwelfare.gov/pubs/usermanuals/foundation/foundation.pdf 24

Joan Levy Zlotnik, Diane DePanfilis, Clara Daining and Melissa McDermott Lane, *Factors Influencing Retention of Child Welfare Staff: A Systematic Review of Research*, Inst. for the Advancement of Soc. Work. Research, in collaboration with Univ. Md. Sch. of Soc. Work Ctr. for Families & Inst. for Human Servs. Policy (2005). 29

Nat'l Ass'n of Soc. Workers, *Social Work Speaks* (8th ed. 2009) 2

Nat'l Clearinghouse on Child Abuse & Neglect Info., *Prevention Pays: The Costs of Not Preventing Child Abuse and Neglect*, U.S. Dep't of Health & Human Servs. (2001) 11

Oregon Dep't of Human Servs., Children, Adults & Families Div.,
2009 Child Welfare Data Book (2010), *available at* http://www.oregon.gov/DHS/abuse/publications/children/2009-cw-data-book.pdf. 4, 15

Tracy Whitaker, Toby Weismiller & Elizabeth J. Clark,
Assuring the Sufficiency of a Frontline Workforce: A National Study of Licensed Social Workers, Nat'l Ass'n of Soc. Workers (Mar. 2006), *available at* http://workforce.socialworkers.org/studies/children/children_families.pdf 2

U.S. Dep't of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention,
Forming a Multidisciplinary Team to Investigate Child Abuse (2000) 20, 28

U.S. Dept. of Health & Human Servs., Admin. for Children & Families, Admin. on Children, Youth and Families, Children's Bureau,
Child Maltreatment 2008 (2010), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm08/ . 4

ARTICLES

Am. Acad. of Child & Adolescent Psychiatry,
Practice Parameters for the Forensic Evaluation of Children and Adolescents Who May Have Been Physically or Sexually Abused, 36 J. AM. ACAD. CHILD ADOLESCENT PSYCH. J. CHILD. ADOL. PSYCHIATRY 10 Supp. 43S (Oct. 1997) 26

Joyce A. Adams, M.D., et al.,
Examination Findings in Legally Confirmed Child Sexual Abuse: It's Normal to Be Normal,
94 PEDIATRICS 310 (1994) 16

Lisa M. Jones et al.,
Criminal Investigations of Child Abuse: The Research Behind "Best Practices", TRAUMA, VIOLENCE & ABUSE, July 2005, at 254 .... 20, 28, 29

Mark Hardin,
Legal Barriers in Child Abuse Investigations: State Powers and Individual Rights, 63 WASH. L. REV. 493 (1988) 31

V.J. Felitti et al.,
Rela'ionship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study,
14 AM. J. OF PREVENTIVE MED. 245 (1998) 12

INTEREST OF THE *AMICI CURIAE*

The National Association of Social Workers (NASW) and the Oregon Chapter of NASW respectfully submit this brief as *amici curiae* in support of Petitioners Bob Camreta and James Alford.[1]

The National Association of Social Workers (NASW) is the largest professional membership organization of social workers in the world, comprised of nearly 145,000 social workers, with chapters located in all fifty states, the District of Columbia, the Virgin Islands, Guam, Puerto Rico, and internationally. The Oregon Chapter of NASW has 1,785 members. Since its inception in 1955, NASW has worked to develop and maintain high standards of professional practice, to advance sound social policies, and to strengthen and unify the social work profession. Its activities in furtherance of these goals include promulgating professional standards (including Standards for Social Work Practice in Child Welfare), enforcing the NASW Code of Ethics, conducting research and publishing materials relevant to the profession, and providing continuing education.

---

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part, and that no entity or person, other than *amici*, their members, and their counsel, made any monetary contribution towards the preparation and submission of this brief. Counsel of record for all parties have consented to the filing of this brief in letters on file with the Clerk's office.

NASW and its Oregon Chapter have a significant interest in this case because many of their members are actively involved in matters involving the safety and protection of children. "[S]ocial workers have been steadfast in their professional and personal commitments to protect children and preserve families. These commitments are demonstrated through their clinical interventions and direct work with children and families, by developing programs and social supports that help prevent child abuse, and by influencing social policies that provide children and families with safety nets and needed services when they find themselves in crisis." Tracy Whitaker, Toby Weismiller & Elizabeth J. Clark, *Assuring the Sufficiency of a Frontline Workforce: A National Study of Licensed Social Workers*, Nat'l Ass'n of Soc. Workers, 8-9 (Mar. 2006), *available at* http://workforce.socialworkers.org/studies/children/children_families.pdf.

NASW's policy statement, *Child Abuse and Neglect*, supports the position that "[c]hild abuse and neglect investigations and substantiations are best conducted using a specially trained, multidisciplinary team, including social workers, law enforcement, and health and mental health professionals." Nat'l Ass'n of Soc. Workers, *Social Work Speaks* 42, 46 (8th ed. 2009). Social workers are also mandated by statute to report suspected incidents of child abuse in all 50 states and the

District of Columbia.[2] Affirmance of the Ninth Circuit decision in this case would adversely impact both the daily work of social workers, and the

---

[2] ALA. CODE § 26-14-3(a) (2003); ALASKA STAT. § 47.17.020(a) (2008); ARIZ. REV. STAT. ANN. § 13-3620(A) & (C) (2003); ARK. CODE ANN. § 12-12-507(b)-(c) (2009), CAL. PENAL CODE § 11165.7(a)(15) (2010); COLO. REV. STAT. ANN. § 19-3-304(1), (2), (2.5) (2008); CONN. GEN. STAT. ANN. § 17a-101(b) (2002); DEL. CODE ANN. tit. 16, § 903 (2008); D.C. CODE § 4-1321.02 (2009); FLA. STAT. ANN. § 39.201(1) (2008); GA. CODE ANN. § 19-7-5(c) (2008); HAW. REV. STAT. § 350-1.1 (2010); IDAHO CODE § 16-1605 (1) (2010); 325 ILL. COMP. STAT. ANN. 5/4 (2008); IND. CODE § 31-33-5(1)-(2) (2010); IOWA CODE ANN. § 232.69 (2008); KAN. STAT. ANN. § 38-2223 (2006); KY. REV. STAT. ANN. § 620.030(1)-(2) (2008); LA. CHILD. CODE ANN. art. 603(15) (2008); ME. REV. STAT. ANN. tit. 22, § 4011-A(1) (2008); MD. CODE ANN. FAM. LAW § 5-704(a) (2010); MASS. GEN. LAWS. ANN. ch. 119, § 51A (2007); MICH. COMP. LAWS § 722.633 (2010); MINN. STAT. § 626.556 (2010); MISS. CODE ANN. § 43-21-353 (2007); MO. ANN. STAT. § 210.115(1) (2010); MONT. CODE ANN. § 41-3-201 (2007); NEB. REV. STAT. ANN. § 28-711(1) (2008); NEV. REV. STAT. ANN. § 432B.220 (2008); N.H. REV. STAT. ANN. § 169-C:29 (2009); N.J. STAT. ANN. § 9:6-8.10 (2009); N.M. STAT. ANN. § 32A-4-3(A) (2005); N.Y. SOC. SERV. LAW § 413(1) (2008); N.C. GEN. STAT. § 7B-301 (2005); N.D. CENT. CODE § 50-25.1-03 (2007); OHIO REV. CODE ANN. § 2151.421 (2008); OKLA. STAT. tit. 10A, § 1-2-101 (2009); OR. REV. STAT. § 419B.010 (2009); 23 PA. CONS. STAT. § 6311(a) (2007); R.I. GEN. LAWS § 40-11-3(a) (2008); S.C. CODE ANN. § 63-7-310 (2007); S.D. CODIFIED LAWS § 26-8A-3 (2008); TENN. CODE ANN. § 37-1-403 (2008); TEX. FAM. CODE ANN. § 261.101 (2007); UTAH CODE ANN. § 62A-4a-403 (2008); VT. STAT. ANN. tit. 33, § 4913 (2007); VA. CODE. ANN. § 63.2-1509 (2009); WASH. REV. CODE. ANN. § 26.44.030 (2007); W. VA. CODE § 49-6A-2 (2006); WIS. STAT. § 48.981(2)(a) (2010); WYO. STAT. ANN. § 14-3-205 (2007).

children and families that they have a duty to protect.

SUMMARY OF THE ARGUMENT

Child abuse, including child sexual abuse, continues to pose a widespread and disturbing national problem. According to the most recent statistics available from the U.S. Department of Health and Human Services, an estimated 3.7 million children nationwide were the subject of reports to child welfare authorities in 2008. Of these, approximately 758,000 children were found to have been maltreated, with 9.1 percent – approximately 69,000 children – suffering sexual abuse. U.S. Dept. of Health & Human Servs., Admin. for Children & Families, Admin. on Children, Youth and Families, Children's Bureau, *Child Maltreatment 2008*, 24-26 (2010), *available at* http://www.acf.hhs.gov/programs/cb/pubs/cm08/. During 2009, the Oregon Department of Human Services alone referred 28,584 reports of child abuse or neglect for further investigation, ultimately substantiating over 11,000 individual child victims and 1,270 instances of child sexual abuse, a 15 percent increase in child sexual abuse incidents over 2008. Oregon Dep't of Human Servs., Children, Adults & Families Div., *2009 Child Welfare Data Book* 3, 5, 7 (2010), *available at* http://www.oregon.gov/DHS/abuse/publications/children/2009-cw-data-book.pdf [hereinafter Oregon DHS, *2009 Child Welfare Data Book*].

In view of these distressing statistics, federal and state governments have enacted laws and developed programs to protect children and prevent child abuse. The legislative frameworks in place anticipated that persons and agencies with child protection expertise, including social workers, could bring their specialized knowledge to bear in crafting and carrying out processes to best help child victims and children at risk of abuse. An important part of the child protection scheme involves ensuring that, following a credible report of potential child abuse, the child's safety is promptly assessed in order to swiftly take whatever steps are necessary to protect that child from harm. The assessment process generally requires an interview with the child by a person specially trained to conduct such interviews.

The protective benefits of the assessment process are undermined by the Ninth Circuit's decision to treat assessment interviews of potential child victims as criminal proceedings requiring, in most cases, a showing of probable cause and a warrant or court order. The Ninth Circuit's scheme runs counter to federal and state legislative intent to protect children from harm. It would greatly increase the States' difficulty in protecting children from abuse, particularly sexual abuse, and some children would not be protected. Furthermore, it would impede the development and implementation of best practices for helping children who have been, or may be, abused.

By contrast, the Fourth Amendment reasonableness balancing test applicable to witnesses is the appropriate standard for an interview with a

potential child abuse victim, since the child is a witness and/or victim, not a suspect or perpetrator. Under this standard, assessment interviews of the type conducted by Mr. Camreta and Deputy Sheriff Alford – out of the presence of the child's parents, by a trained interviewer with multiple professionals present, in the safe and neutral setting of the child's school – are reasonable. Such interviews allow children to be promptly protected from any further harm, while minimizing the risk that the investigative process itself will cause additional trauma to a child.

ARGUMENT

I. THE NINTH CIRCUIT'S REQUIREMENT OF PROBABLE CAUSE OR PARENTAL CONSENT DISREGARDS AND UNDERMINES THE PRIMARY PURPOSE OF FEDERAL AND STATE CHILD ABUSE LAWS: PROTECTING CHILDREN

The federal Child Abuse Prevention and Treatment Act ("CAPTA" or "the Act") provides the basis for Oregon's child protective laws and programs implicated in this case. CAPTA mandates particular state practices, including a prompt investigation in response to a report of suspected child abuse, as a condition for states to receive federal grants. The main objective of CAPTA, the state laws it governs, and indeed, any child protection system, is, first and foremost, to keep children safe from harm. *See, e.g.*, Testimony of Caren Kaplan, MSW, Dir. of Child Prot. Reform, Am. Humane Ass'n, Before the U.S. House Comm. on Educ. & Labor's Subcomm. on Healthy

Families & Cmtys., *Preventing Child Abuse and Improving Responses to Families in Crisis*, 1 (Nov. 5, 2009), *available at* http://edlabor.house.gov/documents/111/pdf/testimony/20091105CarenKaplanTestimony.pdf. That objective is not served by the Ninth Circuit's requirement that, in order to interview a child following a report of suspected child sexual abuse, a caseworker and deputy sheriff must normally obtain either parental consent, or a warrant or court order supported by probable cause, and must show probable cause even when acting swiftly in an emergency situation ("exigent circumstances").

The Ninth Circuit standard, which was designed to protect the rights of criminal suspects, not only ignores but also contradicts legislative intent in this setting. Criminal prosecution of suspected perpetrators is not the main objective of CAPTA and the Oregon state law modeled upon it. At most, prosecution is a possible secondary effect to the primary aim of child protection. The probable cause requirement, if allowed to stand, would operate against the main purpose of CAPTA by making it significantly harder for the States to protect children from abuse, particularly sexual abuse. The requirement also hinders the ability of the States to develop guidelines, best practices, and individualized responses geared towards preventing and minimizing harm to children.

A. CAPTA and Oregon's Resulting Laws Support a Protective, Rather than Prosecutorial, Purpose

CAPTA was originally enacted in 1974 in response to nationwide concerns about child abuse. Child Abuse Prevention and Treatment Act (CAPTA), Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. §§ 5101 *et seq.* and §§ 5116 *et seq.*). CAPTA has been amended several times, most recently by the Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36, 117 Stat. 800-831 (2003). The very titles of these laws emphasize preventing child abuse and keeping children safe, and this emphasis is borne out by the statutory language. Section 5106a, entitled "Grants to States for child abuse and neglect prevention and treatment programs," authorizes grants "for purposes of assisting the States in improving the child protective services system of each such State," and specifies numerous improvements relating to assessment of abuse reports, case management, training for workers providing services to children and families, and other protective purposes. It refers repeatedly to the "child protective system" or "child protection system" throughout, and distinguishes it from the "justice system." § 5106a(a)(4), (7), (14); § 5106a(a)(13) (referring to "interagency collaboration between the child protection system and the juvenile justice system"). An entire subchapter of the Act is also devoted to "support[ing] community-based efforts" towards "initiatives aimed at the prevention of child abuse and neglect,"

"reduc[ing] the likelihood of child abuse and neglect," and "foster[ing] an understanding" of diverse populations in order to "be effective in preventing and treating" child abuse and neglect. § 5116(a)(1)-(2), & *et seq.*

By contrast, only one provision of one subsection, 42 U.S.C. § 5106c(a)(3), directly refers to grants for "the investigation and prosecution of cases of child abuse and neglect[.]" This provision is grouped with three other protection-related provisions, concerning grants for handling cases "in a manner which limits additional trauma to the child victim," (§ 5106c(a)(1)), improving handling of cases of child victims with "disabilities or serious health-related problems" (§ 5106c(a)(4)), and improving handling of "suspected child abuse or neglect related fatalities" (§ 5106c(a)(2)). (Although section 5119 addresses reporting of child abuse crime information to a national background check system, it does not discuss actual prosecutions.) Overall, the plain language of the Act does not focus on arresting and punishing suspected perpetrators, but instead shows an overarching purpose of protecting children from harm.

Legislative history also shows that CAPTA and its subsequent amendments were enacted with the intent "to strengthen and support families with children and to protect children from abuse and neglect[.]" S. Rep. No. 108-12, at 2 (2003), *reprinted in* 2003 WL 881123. At the time of the most recent CAPTA amendments in 2003, a Senate committee stated that "[c]hild welfare policy must continue to place a high emphasis on [children's] safety," and

highlighted the need for child protective agencies to thoroughly investigate reports and "respond promptly and effectively" when children are endangered. *Id.* at 2-3.

The House committee considering the 2003 amendments similarly emphasized the preventive aspects of the law. H.R. Rep. No. 108-26, at 25 (2003), *reprinted in* 2003 WL 881120 (discussing, among other things, the "efforts made to prevent child abuse and neglect," the need for States to find "effective methods of prevention," and federal "prevention resources" enabled by the Act). Moreover, although the House committee noted the individual rights of parents being investigated on child abuse allegations, it sought ways to protect those rights "while not compromising the intent of the child protective services system – to ensure that the best interest of the child is the primary focus." *Id.* at 27.

This primary emphasis on protecting children from maltreatment, including child sexual abuse, is well founded considering the significant psychosocial and economic damages to both the child victim and to society, once maltreatment occurs.

> Child abuse and neglect have known detrimental effects on the physical, psychological, cognitive, and behavioral development of children. These consequences . . . include physical injuries, brain damage, chronic low self-esteem, problems with bonding and forming relationships, developmental

> delays, learning disorders, and aggressive behavior. Clinical conditions associated with abuse and neglect include depression, post-traumatic stress disorder, and conduct disorders. Beyond the trauma inflicted on individual children, child maltreatment also has been linked with long-term, negative societal consequences. For example, studies associate child maltreatment with increased risk of low academic achievement, drug use, teen pregnancy, juvenile delinquency, and adult criminality. Further, these consequences cost society by expanding the need for mental health and substance abuse treatment programs, police and court interventions, correctional facilities, and public assistance programs, and by causing losses in productivity. Calculation of the total financial cost of child maltreatment must account for both the direct costs as well as the indirect costs of its long-term consequences.

Nat'l Clearinghouse on Child Abuse & Neglect Info., *Prevention Pays: The Costs of Not Preventing Child Abuse and Neglect*, U.S. Dep't of Health & Human Servs. (2001) (internal citations omitted). Abuse in childhood has also been linked to a higher incidence in adulthood of serious illness and unhealthy behaviors including smoking, substance abuse, attempted suicide, and sexual promiscuity. *See*

generally V.J. Felitti et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 14 AM. J. OF PREVENTIVE MED. 245 (1998).

In keeping with the protective and preventive objectives of CAPTA, Oregon has established statutes and detailed administrative rules for handling reports of child abuse, with the primary objective of ensuring children's safety. The state legislature has adopted a policy that "for the purpose of facilitating the use of protective social services to prevent further abuse, safeguard and enhance the welfare of abused children, and preserve family life when consistent with the protection of the child . . . it is necessary and in the public interest to require mandatory reports and investigations of abuse of children and to encourage voluntary reports." OR. REV. STAT. § 419B.007 (2009). Those mandated to report suspected child abuse under the statute include (but are not limited to) doctors, nurses, school employees, child-care providers, and social workers. *Id.* § 419B.010. Incoming reports are screened by the state Department of Human Services to gather necessary information and determine whether each report requires further response. OR. ADMIN. R. 413-015-0205 (2010). In particular, the screener determines whether to refer the case for an assessment by Child Protective Services (CPS). *Id.* at 413-015-0210. CPS states that its purpose is "to identify child safety threats and to assure protection of children after a report of alleged child abuse or

neglect is received by a screener." *Id.* at 413-015-0100 & 0105.

Oregon's rules require a CPS assessment where the screener determines that information received constitutes a report of child abuse or neglect, and any one of several other conditions relevant to the child's safety applies, including the alleged abuser being a legal parent of the child, residing in the child's home, or potentially having access to an unprotected child. *Id.* at 413-015-0210(2). When an assessment is required, the CPS case worker must make an "initial contact" with the child within either 24 hours or five days, depending on factors such as the child's location and whether a delay will compromise the child's safety. *Id.* at 413-015-0210(3). To make an "initial contact," the CPS worker must "have face-to-face contact with and interview the alleged victim, his or her siblings, and other children living in the home. The purpose of the face-to-face contact and interview . . . is to gather information regarding possible child abuse and neglect, assess if the children are vulnerable to identified safety threats, and assess the children's immediate safety." *Id.* at 413-015-0420(1)(a).

In other words, both federal and state laws support the necessity of an assessment interview with a potential child abuse victim, such as occurred in this case, to ensure the child's safety. The assessment interview is not a criminal investigation of the alleged abuser, and should not be subject to a criminal standard.

B. The Ninth Circuit's Requirements, If Allowed to Stand, Would Make It Much Harder For States to Protect Children From Abuse, Particularly Sexual Abuse

Requiring either parental consent, a showing of probable cause with exigent circumstances, or a warrant or court order supported by probable cause, would make it very difficult to protect children from abuse in the manner that Congress and the state of Oregon intended. By contrast, the reasonableness balancing test described by Petitioners allows better protection of children, because the reasonableness of a practice may be evaluated, at least in part, on whether the practice is in the child's best interest. (As discussed in more detail *infra* at Part II of this brief, several characteristics of the interview conducted by Petitioners in this case, including having no parents present at the interview, having a trained caseworker conduct the interview while a professional from another agency observed, and locating the interview at the child's school, are all reasonable, generally accepted best practices which take the child's welfare into account.)

Probable cause presents child abuse investigators with difficulties that can only be avoided by obtaining parental consent before interviewing a child. A showing of probable cause is likely to be required in many, if not most, cases because parents of child victims have strong motivations not to give consent. Indeed, the parent whose consent is sought may be the suspected

perpetrator of the abuse. According to a recent federal government report, 60% of child sexual abuse victims are abused by a parent or the partner of a parent; in more than half of those cases, the abuser is the child's biological parent. A.J. Sedlak et al., *Fourth National Incidence Study of Child Abuse and Neglect (NIS-4): Report to Congress*, U.S. Dep't of Health & Human Servs., Admin. for Children & Families, 6-5 (Table 6-2) (2010), *available at* http://www.acf.hhs.gov/programs/opre/abuse_neglect/natl incid/nis4_report_congress_full_pdf_jan2010.pdf. Even non-abusive parents clearly have incentives – such as family loyalty, denial, embarrassment, fear of retaliation, or loss of household income – to avoid an investigation where the suspect is the other parent or another family member.[3] The vast majority of child abuse and neglect perpetrators (over 94% in Oregon in 2009) are related to the child and/or live in the family home, indicating that consent might be withheld in a large number of cases. *See* Oregon DHS, *2009 Child Welfare Data Book*, at 9.

Therefore, under the Ninth Circuit standard, investigators would have to show probable cause in numerous cases of suspected child abuse before they

---

[3] For example, it has been estimated that 70% of men who abuse their wives also abuse their children. H.R. Rep. No. 108-26, at 25 (2003), *reprinted in* 2003 WL 881120. An abused mother may thus avoid an investigation into the father's abuse of their child because she fears incurring the father's wrath herself, or because she wishes to hide or deny the fact that she too has been abused.

could interview the children involved. As Petitioners have noted, this creates a circular reasoning problem, particularly in cases of child sexual abuse. This form of abuse generally takes place in secret, and the only two persons present are the child and the abuser. Frequently, the primary account of the abuse can only come from the child. *See, e.g.*, *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2663-64 (2008). Furthermore, sexual abuse often leaves no visible or abnormal physical signs on a child, even to a medical examiner's trained eye. Joyce A. Adams, M.D., et al., *Examination Findings in Legally Confirmed Child Sexual Abuse: It's Normal to Be Normal*, 94 PEDIATRICS 310, 315 (1994). Doctors and medical researchers have thus concluded that "the history of the molest provided by the child is probably the most important evidence of sexual abuse." *Id.* at 316. For all these reasons, where child sexual abuse is suspected, it is almost impossible to develop probable cause without interviewing the child. Under this scenario, it is likely that many sexually abused children will not be protected and will suffer further abuse, because investigators will not be able to develop the probable cause necessary to interview them.

Even if investigators could somehow develop the required probable cause, the extra time required to do so weighs against the need to promptly assess the child's safety. Oregon currently requires that initial contact – i.e. an assessment interview with the child – must take place within 24 hours after a screener has confirmed that a report of child abuse has been made. An exception is only made where the

screener can document that the child's safety will not be compromised by responding within five days, and also that "an intentional delay for a planned response" is less likely to compromise the child's safety than an immediate response. OR. ADMIN. R. 413-015-0210(3)(a) (2010). Developing probable cause without an interview, even if it can be done, will probably take longer than 24 hours and perhaps even longer than five days, causing endangered children to remain at risk of harm for longer time periods.

Furthermore, without an assessment interview, investigators would also have difficulty showing "exigent circumstances," i.e. a child in imminent danger of harm, under the Ninth Circuit's jurisprudence. Consequently, most cases would require investigators to first show probable cause and then obtain a warrant or court order based on the showing. Given the sheer number of child abuse reports referred for investigation – over 28,500 in Oregon alone in 2009, as discussed *supra* – the need to obtain a warrant or order in a substantial number of these cases would create significant administrative and judicial burdens. As legislators have observed, many child protection caseworkers are already dealing with large numbers of cases, and are frequently overextended to the point where they have difficulty responding to reports of maltreatment in a timely or adequate manner. H.R. Rep No. 108-26, at 25; S. Rep No. 108-12, at 2. The additional hurdles added by the Ninth Circuit will not help, and may even have the further unwanted effect of driving skilled caseworkers out of the profession by

emphasizing accountability to an adversarial court system over working with children and families. *See* Child Welfare League of Am., et al., *Workforce Recruitment and Retention in Child Welfare: A Review of the Literature* 2-3 (2005) (describing the problem of high turnover among child protective services workers as caused in part by more time spent on documentation requirements, preparing for court appearances and accounting to courts than on working with families).

The risk of abuse in the face of administrative delay not only attaches to the reported child victim, but extends to that child's young siblings and/or other children living in the same home. As previously discussed, the CPS caseworker is also required to have face-to-face contact and an interview with these children to make sure they too are safe. OR. ADMIN. R. 413-015-0210(3). If the interview with the reported child victim is not allowed, then interviews with siblings and other children in the home will be an even more remote possibility. Difficulty in showing probable cause could thus leave not only the child who is the subject of the report, but also several more children from the same home or family, in a dangerous situation, indefinitely. The inevitable result is that more children will suffer harm because the child protection system was unable to act fast enough, or at all, on their behalf.

C. The Ninth Circuit's Requirements Also Hamper States' Abilities to Develop and Implement Best Practices and Guidelines For Protecting Children

The imposition of the Ninth Circuit standard also contravenes the intent of the law by limiting the States' freedom to develop and implement best practices for handling child abuse reports, and individualized responses geared towards each child's situation. CAPTA explicitly encourages States to "enhance[e] the general child protective system by developing, improving, and implementing risk and safety assessment tools and protocols[.]" 42 U.S.C. § 5106a(a)(4). Oregon has developed extensive and detailed administrative procedures for performing child safety assessments. *See, e.g.*, OR. ADMIN. R. 413-015-0415 ("CPS Assessment Activities") & 413-015-0420 ("Make Initial Contact"). The Ninth Circuit decision is highly likely to compel changes to the established assessment protocols of Oregon and other States, regardless of whether those changes comport with known best practices.

The potential exclusion of law enforcement officers from child protective services investigations, in an effort to avoid the appearance of a law enforcement purpose giving rise to a probable cause requirement, is a particular area of concern. As the U.S. Department of Justice has recognized, no single agency has the ability to respond adequately on its own to an allegation of child abuse or to provide necessary services to child victims. U.S. Dep't of

Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, *Forming a Multidisciplinary Team to Investigate Child Abuse*, 4 (2000), *available at* http://www.ncjrs.gov/pdffiles1/ojjdp/170020.pdf [hereinafter USDOJ, *Forming a MDT*]. CAPTA also authorizes grants expressly for the purpose of "creating and improving the use of multidisciplinary teams and interagency protocols to enhance investigations[.]" 42 U.S.C. § 5106a(a)(2)(A). Consequently, the formation of multidisciplinary teams (MDTs), including representatives of both child protective services and law enforcement as well as other agencies such as family services, has become a well-accepted best practice and is often required by state laws. USDOJ, *Forming a MDT*, at 4-6; Lisa M. Jones et al., *Criminal Investigations of Child Abuse: The Research Behind "Best Practices"*, TRAUMA, VIOLENCE & ABUSE, July 2005, at 254-57 (noting the "hundreds" of multidisciplinary teams in use across the country, particularly involving coordination of child protective services with law enforcement).

The team approach allows all disciplines to share their knowledge, skills and abilities and plan strategy together for a more effective and timely response to abuse allegations. Shared information also improves child safety by reducing the risk that a case will somehow "fall through the cracks." Jones at 256. As a result, children are better protected from harm, and the risk of additional trauma to the child victim, caused by the investigation itself, is reduced, in keeping with CAPTA's requirement that child abuse cases, "particularly cases of child sexual abuse

and exploitation," be handled "in a manner which limits additional trauma to the child victim." USDOJ, *Forming a MDT*, at 2, 4; 42 U.S.C. § 5106c(a)(1). Law enforcement collaboration with other agencies can help lessen the trauma caused to the child by an abuse investigation by providing a planned response that reduces the element of surprise to the child and family under investigation. Ctr. for Improvement of Child & Family Servs., Portland State Univ., Sch. of Soc. Work, *Reducing the Trauma of Investigation, Removal, and Initial Out-of-Home Placement in Child Abuse Cases*, 24 (2009), *available at* http://www.ocfs.state.ny.us/main/cfsr/Reducing%20the%20trauma%20of%20investigation%20removal%20%20initial%20out-of-home%20plcaement%20in%20child%20abuse%20cases.pdf [hereinafter *Reducing Trauma*].

However, if allowed to stand, the Ninth Circuit decision will force States to change or even abandon this successful multidisciplinary approach in order to minimize the possibility that a court will find a law enforcement purpose, and thus apply a probable cause requirement, based on the inclusion of law enforcement professionals on the multidisciplinary team. Children will be protected less effectively, and investigative trauma to children will probably increase due to lack of investigative coordination between agencies.

As one example, if law enforcement professionals are not permitted to collaborate with child protective services on an assessment interview of a child victim of abuse, it would be necessary for each agency to conduct its own separate interview of

the child victim. Multiple interviews are not recommended because they increase the trauma to the child, while decreasing the reliability of the information the child provides. This issue is discussed in more detail at paragraph II(B)(2), *infra* (describing why allowing multiple professionals from different agencies to observe an interview conducted by a trained caseworker is reasonable in the context of a child abuse investigation).

Moreover, given the high likelihood of delayed or indefinitely postponed assessment interviews (as discussed *supra* at paragraph I(B)), caseworkers will be forced to make crucial decisions affecting children on incomplete or wrong information. This situation is hardly a good practice, nor is it in the best interest of the child. Instead, it favors the rights of parents and of some suspected perpetrators (especially where the parent is the alleged abuser) over the welfare of children, contrary to legislative intent. *See* H.R. Rep. No. 108-26 at 27 (indicating that the intent of the child protective services system and the primary focus on the child's best interest should not be compromised when seeking to protect parents' individual rights).

D. The Ninth Circuit Decision Should Be Overturned as Contrary to Legislative Intent and Potentially Harmful to Children

Overall, the Ninth Circuit decision requiring probable cause or parental consent before conducting a child safety assessment interview does not comport with the legislative intent to keep children safe and

encourage implementation of child-protective best practices. The standard is not in the child's best interest and is likely to result in more children being abused, in violation of the purposes of CAPTA and applicable Oregon statutes. For all these reasons, it should be overturned.

II. UNDER THE REASONABLENESS BALANCING STANDARD APPROPRIATE FOR WITNESS INTERVIEWS, CHILD INTERVIEWS OF THE TYPE AT ISSUE HERE ARE REASONABLE

In view of the primary goal of child protection, the reasonableness balancing test described by Petitioners is the appropriate standard for evaluating assessment interviews of children who may have been abused. Under that standard, at least three aspects of the interview conducted by Petitioners in this case, including conducting the interview with the child's parents not present, having one trained caseworker conduct the interview with another professional present, and locating the interview at the child's school, support the reasonableness of the interview in this case.

A. The Reasonableness Balancing Standard For Witnesses Properly Focuses Upon Protecting the Child

Obviously, a child whose safety is being assessed via an interview is not a suspect. Rather, the child is a witness and possibly a silent victim, since children rarely report their own abuse. Last year, less than 5.9 percent of Oregon child

maltreatment reports were self-reported by children. Oregon DHS, *2009 Child Welfare Data Book*, at 4. *See also Kennedy*, 128 S. Ct at 2663-64 (discussing how victims of childhood rape tend to keep it secret and only rarely report it to authorities). It is sadly ironic to subject an abused child to a criminal probable cause standard designed to protect suspects, while at the same time maintaining that the child did not cause or bring on the abuse and has committed no wrong. *See, e.g.*, Jill Goldman et al., *A Coordinated Response to Child Abuse and Neglect: A Foundation for Practice*, U.S. Dep't of Health & Human Servs., 32 (2003), *available at* http://www.childwelfare.gov/pubs/usermanuals/foundation/foundation.pdf ("Children are not responsible for being victims of maltreatment."). The reasonableness standard is not only the proper standard for witnesses in light of the law (as Petitioners have explained), but also shifts the focus from protecting a suspect's rights back to protecting the child, since determining whether an interview is reasonable must take into account the child's best interests and the CAPTA-mandated need to minimize further trauma to the child. 42 U.S.C. § 5106c(a)(1) (requiring "the handling of child abuse and neglect cases, particularly cases of child sexual abuse and exploitation, in a manner which limits additional trauma to the child victim").

B. Child Assessment Interviews Having the Characteristics of the Interview At Issue Are Reasonable

Under the reasonableness balancing test, the circumstances of the assessment interview at issue in this case show that the investigators' actions were both justified and related in scope to the situation. The interview was conducted outside the presence of the child's parents, one of whom was the suspected abuser. A state child protective services investigator conducted the interview, with another professional – a law enforcement officer – present. The location of the interview was not at the child's home, but rather at the child's school. These conditions are reasonable as being best practices that effectively gather information to properly assess the child's safety, while minimizing trauma to the child that might otherwise be caused by an improper investigation.

1. Interviewing a Child Outside the Presence of Her Parent Is Reasonable

The Oregon investigators appropriately chose to interview S.G., whose father was suspected of sexually abusing her, without either of her parents present. It is a well-established best practice to interview children who may have been abused outside the presence of their parents. This practice recognizes the fact that, as discussed *supra* at paragraph I(B), a parent is often the suspected perpetrator of the abuse (as in this case), and that even if not suspected, a parent may still have a detrimental influence on the child's disclosure. *See*,

e.g., Am. Acad. of Child & Adolescent Psychiatry, *Practice Parameters for the Forensic Evaluation of Children and Adolescents Who May Have Been Physically or Sexually Abused*, 36 J. AM. ACAD. CHILD ADOLESCENT PSYCH. J. CHILD. ADOL. PSYCHIATRY 10 Supp. 43S, 48S (Oct. 1997) ("In general, the examination [interview with a child] should take place without the parent present."); Am. Prof'l Soc. on the Abuse of Children, *Practice Guidelines: Investigative Interviewing in Cases of Alleged Child Abuse* 4 (2002) [hereinafter APSAC Guidelines] ("In general, because of possible detrimental influence to the interview process, parents should not be present during the interview.").

2. Having Multiple Professionals Present at a Single Interview of a Child Is Reasonable

Having a single trained caseworker conduct he assessment interview, while one or more professionals from other agencies – in this case, a law enforcement officer – sit in on the interview without asking questions, is also a reasonable investigative practice. This is considered a best practice because the child will not be forced to submit to multiple interviews conducted by different agencies involved with the case, thus reducing the risk that the child will be further traumatized by the investigative process and/or that the child's memories will be affected by repetition or suggestion.

CAPTA contains goals relating to both agency coordination and to minimizing the trauma to children caused by the investigative process.

42 U.S.C. §§ 5106a(a)(2)(A), 5106c(a)(1) (authorizing grants respectively for "creating and improving the use of multidisciplinary teams and interagency protocols to enhance investigations," and for improving the handling of child abuse cases, particularly sexual abuse cases, in "a manner which limits additional trauma to the child victim"). Trauma adversely affects many areas of a child's development and functioning, and children coming into the protective system are often already traumatized from their maltreatment. *Reducing Trauma* at 1. A child abuse investigation carries a high potential for additional trauma, due to the potential conflicts between professionals and the child's family. *Id.* at 1, 10. Therefore, as Congress has mandated, steps should be taken wherever possible to reduce the trauma of investigations. Collaboration and coordination between agencies, including child protective services and law enforcement, helps minimize trauma generally by reducing the element of surprise to the child and family under investigation, and allowing a more measured, planned response. *See id.* at 16, 24.

With respect to assessment interviews in particular, allowing professionals from other agencies to be present at an interview conducted by a trained caseworker reduces trauma to the child by minimizing the number of times the child must tell his or her story and essentially relive the bad experience. This Court, as well as social services and professional associations dealing with child abuse, has recognized the potentially traumatic effects on a child of having to recount his or her sexual abuse

over and over again. *Kennedy*, 128 S. Ct. at 2662-63 (citing G. Goodman et al., *Testifying in Criminal Court: Emotional Effects on Child Sexual Assault Victims* 50, 62, 72 (1992)). Accordingly, the Justice Department and researchers have recommended that multiple interviews be avoided, and that professionals from different agencies coordinate activities to achieve this outcome. USDOJ, *Forming a MDT*, at 6 (noting that research supports use of a multi-disciplinary investigative team to "reduce the number of investigatory interviews a child must endure" and thus reduce "system intervention trauma"); APSAC Guidelines at 3 (noting that "multiple interviews, especially when conducted by different interviewers, may also be associated with increased child distress"); *Reducing Trauma* at 26 (recommendation to "avoid the need for multiple interviews" and to have law enforcement watch the interview, although from outside the room). This approach appears to have reduced the number of interviews per child in at least some jurisdictions. *See* Jones at 256.

Having a single interview, with other professionals observing, also allows the interview to be conducted by the professional with the best training and knowledge, and allows other agencies to benefit from that person's skill.[4] *See* APSAC

[4] In this case the interviewer was an experienced and trained protective services caseworker. NASW recommends the use of social workers with a bachelor's or master's degree for child welfare positions. "Professional commitment and level of education are the most consistent personal characteristics and

Guidelines at 3 (stating that "it is desirable to appoint the most experienced or most capable professional to be the primary interviewer" while other professionals play a "minimal" role or simply observe); Jones at 257-58 (discussing importance of training for child interviewers, in order to obtain accurate and detailed information without distressing the child). The professionals who are observing but not asking questions have the opportunity to confer with the interviewer, who can then put any question that the other professionals have into the correct form for the child. *See Reducing Trauma* at 26 (advising that law enforcement officer should watch the interview and "may ask that a particular question be asked").

Avoiding multiple interviews also reduces the risk that a child, when questioned multiple times about the same events, will eventually change the story to agree with what the child perceives is the interviewer's desired response. As this Court has noted, children, including victims of abuse, are highly susceptible to suggestive questioning,

---

supervisory support and workload/caseload are the most consistent organizational factors identified in the research...." when reviewing the factors positively associated with child welfare staff retention. Joan Levy Zlotnik, Diane DePanfilis, Clara Daining and Melissa McDermott Lane, *Factors Influencing Retention of Child Welfare Staff: A Systematic Review of Research*, Inst. for the Advancement of Soc. Work. Research, in collaboration with Univ. Md. Sch. of Soc. Work Ctr. for Families & Inst. for Human Servs. Policy (2005).

including repetition of questions. *See, e.g.*, *Kennedy*, 128 S. Ct. at 2663; APSAC Guidelines at 3.

For all these reasons, the American Professional Society on the Abuse of Children (APSAC) has indicated that multiple interviews should only be conducted if a child needs a second opportunity to give complete information, or if later findings suggest additional incidents of abuse or additional abusers. APSAC has stated that "[m]ultiple investigative interviews should not be conducted simply because professionals fail to share information with each other." APSAC Guidelines at 3. In view of this need to avoid unnecessary multiple interviews, particularly by different interviewers, the assessment interview conducted by Petitioners was reasonable.

3. Interviewing a Child at School Is Reasonable

The investigators in this case also acted reasonably by interviewing S.G. at her school. As the American Professional Society on the Abuse of Children (APSAC) has noted, choosing the location of a child's interview is important. The interview should take place in an environment that is neutral, private, informal, and free from distractions; the suspected abuser should not be in the vicinity. *See, e.g.*, APSAC Guidelines at 3 (citing a number of other research sources in support). Assuming that the suspected abuser is not a school employee, school fits all these criteria, and APSAC has recognized that "[s]ometimes interviews are conducted at the child's school[.]" *Id.* School has the advantage of being a

familiar, comfortable place to the child, and is often perceived by the child as a safe place. *Cf. Reducing Trauma* at 18 (noting that school may be the one place where an abused child feels safe). School officials can also coordinate with caseworkers to make sure that the child is available for a period of time sufficient to conduct the interview. APSAC Guidelines at 3. This is important because interviewing a child is a sensitive matter that requires additional time beyond the relatively brief "*Terry* stop."

Furthermore, an in-school interview allows social workers to evaluate the child promptly while avoiding the constitutional problems inherent in obtaining access to the family home, particularly where the parent or other responsible adult does not consent to allow investigators into the home. *See generally* Mark Hardin, *Legal Barriers in Child Abuse Investigations: State Powers and Individual Rights*, 63 WASH. L. REV. 493, 500-548 (1988) (analyzing constitutional and legal issues surrounding a child abuse investigator's gaining entry to the child's home); H.R. Rep. No. 108-26, at 27 (stating that "the [House] Committee believes that child protective services personnel should understand that they don't have the authority to demand entry into the family home when investigating an allegation."). Aside from the procedural hurdles, interviewing the child at home would also be at odds with the need to conduct the interview outside the parents' presence, because at least one parent normally lives with the child in the home. Interviewing the child at a non-home, non-

school location, such as a child advocacy center, also may create delays while investigators ensure "that they have the legal authority to transport the child to the site." APSAC Guidelines at 2.

Given that young children of school age spend most of their time either at home or at school, and barriers to interviews in the home and elsewhere already exist, creating an additional barrier to interviews at school would drastically reduce the access of caseworkers to children who may have been abused, making it difficult for caseworkers to determine whether children are safe and take protective steps if needed. The relative ease to both caseworker and child of having the interview in the familiar surroundings of the child's school makes that location reasonable, given that time is of the essence in performing the safety assessment, as recognized by Congress, CAPTA and the Oregon child protective services rules.

CONCLUSION

Allowing the Ninth Circuit decision to stand would have serious detrimental consequences on the ability of States to protect children from abuse, particularly sexual abuse, thus frustrating a central purpose of CAPTA and the laws that Oregon and other States built on CAPTA. Best practices, carefully developed through research and experience, would fall by the wayside, and children would suffer further abuse and investigative trauma as a result. For all these reasons, this Court should grant the relief requested by Petitioners.

Respectfully submitted,

CAROLYN I. POLOWY
SHERRI MORGAN
NATIONAL ASSOCIATION OF SOCIAL WORKERS
750 First St. NE
Suite 700
Washington, D.C. 20002
(202) 336-8282
SMorgan@naswdc.org

MARY M. CALKINS
Counsel of Record
GEORGE E. QUILLIN
FOLEY & LARDNER, LLP
3000 K St. NW
Suite 500
Washington, D.C. 20007-5143
(202) 672-5300
mcalkins@foley.com

Counsel for the Amici Curiae

DECEMBER 2010

Supreme Court, U.S.
FILED
DEC 17 2010
OFFICE OF THE CLERK

7

No. 09-1454; 09-1478

IN THE
Supreme Court of the United States

BOB CAMRETA, *Petitioner* v. SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor, *Respondent*

JAMES ALFORD, DESCHUTES COUNTY DEPUTY SHERIFF, *Petitioner* v. SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor, *Respondent*

On Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit

AMICI CURIAE BRIEF OF NATIONAL SCHOOL BOARDS ASSOCIATION, CALIFORNIA SCHOOL BOARDS ASSOCIATION, AND OREGON SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

Francisco M. Negron, Jr.*
General Counsel
National School Boards Ass'n
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

Matthew W. Wright
David K. Pauole
Holm Wright Hyde & Hays PLC
10429 South 51st St., Suite 285
Phoenix, AZ 85044
(480) 961-0040

* Counsel of Record

451 a (21)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 3

STATEMENT OF THE CASE 4

ARGUMENT 5

I. MERELY ALLOWING ACCESS TO A STUDENT WHO IS A SUSPECTED VICTIM OF CHILD ABUSE DOES NOT CONSTITUTE A SEIZURE BY SCHOOL OFFICIALS 5

II. IMPLICATING SCHOOL DISTRICTS AND OFFICIALS IN SUCH A "SEIZURE" PLACES THEM IN AN UNTENABLE POSITION 8

CONCLUSION 15

TABLE OF AUTHORITIES

Page

Cases:

Couture v. Board of Educ. of Albuquerque Pub. Schs.,
535 F.3d 1243 (10th Cir. 2008) 6

Florida v. Bostick,
501 U.S. 429 (1991) 6

Greene v. Camreta,
588 F.3d 1011 (9th Cir. 2009) 4, 7

INS v. Delgado
466 U.S. 210 (1984) 6

Morse v. Frederick,
551 U.S. 393 (2007) 8

New Jersey v. T.L.O.,
469 U.S. 325 (1985) 7, 11

Terry v. Ohio,
392 U.S. 1 (1968) 6

United States v. Mendenhall,
446 U.S. 544 (1980) 5, 6

Vernonia Sch. Dist. 47J v. Acton,
515 U.S. 646 (1995) 6

Statutes and Regulations

ALA. CODE § 13A-10-2 (2010) 14
ARK. CODE ANN. § 5-54-102 (WEST 2010) 14
ARK. CODE ANN. § 12-18-501 (2010) 12
CAL. PENAL CODE § 148 (WEST 2010) 14
CAL. PENAL CODE § 11167.5 (WEST 2010) 12
CAL. PENAL CODE § 11174.3(a) (WEST 2010) 9
COLO. REV. STAT. § 18-8-104 (WEST 2010) 14
CONN. GEN. STAT. ANN. § 17a-101k (WEST 2010) 12
CONN. GEN. STAT. ANN. § 53a-167a (WEST 2010) 14
FLA. STAT. ANN. § 39-301 (19) (WEST 2010) 9
FLA. STAT. ANN. § 843.06 (WEST 2010) 14
GA. CODE ANN. § 16-10-24 (WEST 2010) 14
GA. CODE ANN. § 49-5-44 (WEST 2010) 13
HAW. REV. STAT. § 350-1.4 (2010) 13
IDAHO CODE ANN. § 18-705 (2010) 14
IOWA CODE ANN. § 232.71B(6) (WEST 2010) 9
IOWA CODE ANN. § 235A.17 (WEST 2010) 13
KAN. STAT. ANN. § 38-2226(g) (WEST 2010) 9
LA. CHILD. CODE ANN. ART. 612(A)(2) (2010) 10
LA. CHILD. CODE ANN. ART. 616 (2010) 13
MASS. GEN. LAWS ANN. CH. 268 § 24 (2010) 14
ME. REV. STAT. ANN. TIT. 22 § 4021 (3) (2010) 10
MINN. STAT. ANN. § 609.50 (WEST 2010) 14
MONT. CODE ANN. § 45-7-302 (2010) 14
NEB. REV. STAT. ANN. § 28-725 (2010) 13
NEB. REV. STAT. ANN. § 28-906 (2010) 14
N.C. GEN. STAT. ANN. § 14-223 (WEST 2010) 14
N.H. REV. STAT. ANN. § 169-C:38 IV (2010) 10
N.J. STAT. ANN. § 9:6-810a (WEST 2010) 13
OHIO REV. CODE ANN. § 29221.31 (WEST 2010) 14
OKLA. STAT. ANN. TIT. 21 § 540 (2010) 14
OR. REV. STAT. ANN. § 162.247 (WEST 2010) 14

OR. REV. STAT. ANN. § 419B.045 (WEST 2010) 9
PA. CONS. STAT. ANN. TIT. 23 § 6339 (2010).....13
R.I. GEN. LAWS § 11-32-1 (2010) 14
R.I. GEN. LAWS § 42-72-8 (2010) 13
S.C. CODE ANN. § 63-7-920 (C) (2010) 9
S.C. CODE ANN. § 63-7-1990 (2010).....13
S.D. CODIFIED LAWS § 22-11-6 (2010) 14
S.D. CODIFIED LAWS § 26-8A-13 (2010).....13
TENN. CODE ANN. § 39-16-602 (WEST 2010) 14
TEX. PENAL CODE ANN. § 38.15 (WEST 2010).....14
UTAH CODE ANN. § 76-8-301 (WEST 2010) 14
VT. STAT. ANN. TIT. 13 § 3001 (2010) 14
WASH. REV. CODE ANN. § 9A.76.020 (2010) 14
W.VA. CODE § 15-13-5 (2010) 13
W.VA. CODE § 61-5014 (2010) 14
WIS. STAT. ANN. § 946.41 (WEST 2010) 14
WYO. STAT. ANN. § 6-5-204 (2010).....14
WYO. STAT. ANN. § 14-3-214 (2010).....13

Other Authorities

Kan. Atty. Gen. Op. No. 05-10, 2005 WL 751938 (Kan. A.G. 2005) 10

U.S. Department of Health and Human Services Administration for Children and Families, *Mandatory Reporters of Child Abuse and Neglect: Summary of State Laws* (2010), *available at* http://www.childwelfare.gov/systemwide/laws_policies/statute/manda.cfm 8

INTEREST OF *AMICI CURIAE*[1]

The National School Boards Association (NSBA) is a not-for-profit federation of state associations of school boards across the United States. Through its state associations NSBA represents the nation's 95,000 school board members, who, in turn, govern approximately 15,000 local school districts. These local public school districts serve more than 46.5 million public school students, or approximately 90 percent of the elementary and secondary students in the nation.

The California School Boards Association (CSBA) is a California non-profit corporation. CSBA is a member-driven association composed of nearly 1,000 K-12 school district governing boards and county boards of education throughout California. CSBA supports local school board governance and advocates on behalf of school districts and county offices of education. As part of CSBA, the Education Legal Alliance (the "Alliance") helps to ensure that local school boards retain the authority to fully exercise the responsibilities vested in them by law to make appropriate policy and fiscal decisions for their local educational agencies. The Alliance represents its members, just under 800 of the state's 1,000 school districts and county offices of education, by addressing legal issues of statewide concern to school districts. The Alliance's activities include joining in

---

[1] This brief is filed with the consent of all the parties. Letters of consent are on file with the Clerk of this Court. No attorney for any party has authored this brief in whole or in part, and no person or entity other than the *amici curiae* and their members and counsel made any monetary contribution to the preparation or submission of this brief.

litigation where the interests of public education are at stake.

The Oregon School Boards Association (OSBA) is a non-profit association representing more than 1,600 locally-elected public officials who serve school and education service district boards charged with shaping the education programs for the more than 565,000 kindergarten through 12th grade students in Oregon. OSBA's Legal Assistance Trust was established to help districts with the expense of litigation, primarily at the appellate level, which has a statewide impact.

Amici represent the school districts attended by many students who unfortunately are or will become victims of child abuse or neglect. Because of their special responsibility to promote the safety and welfare of all students, public school districts have a strong interest in advocating for the interpretation and application of federal, state and local laws in a manner that allows them to meet their student safety obligations with respect for the rights of students and their families but without undue legal burdens or potential liability. The Ninth Circuit's ruling under review here imposes such burdens and the risk of liability, placing school districts in an untenable legal position while attempting to meet their responsibilities under child abuse laws. *Amici* submit this brief to help inform the Court of the concerns of all public school districts that will be directly affected by the Court's decision in this case.

SUMMARY OF THE ARGUMENT

Although the Ninth Circuit issued no ruling as to the constitutionality of the school district's actions in this case, its decision, if affirmed by this Court, will have a profound effect on the manner in which school districts interact with child protective services workers and law enforcement officers who seek to interview suspected child abuse victims at school. The Ninth Circuit's determination that the interview in this case constituted a seizure to which the Fourth Amendment's probable cause requirement applies raises substantial cause for concern for public school officials for several reasons. The decision leaves open the question of whether the school counselor's actions, which are typical of the role school officials often play in child abuse investigations, would similarly implicate Fourth Amendment concerns. *Amici* urge the Court to declare that where a school official merely grants access to the suspected abuse victim and undertakes no other action with respect to the interview, these actions do not constitute a seizure by the school official. The decision also forces school districts into a position in conflict with many state statutes, including child abuse laws, that encourage or mandate as a matter of public policy that school officials act in manner to protect the health, safety and welfare of the children who are entrusted to them. Finally, it imposes on school officials the legally untenable responsibility to act as a gatekeeper required to assess the constitutionality of the proposed actions of employees of other government agencies charged with investigating suspected child abuse. This responsibility presents a difficult dilemma for school districts: either allow the

interview and risk a lawsuit asserting a constitutional violation or deny the interview in contravention of state statutes and risk permitting the continued abuse of the child. *Amici* urge the Court to rule in a manner providing clear guidance that eliminates the conflict with state laws and removes the legally imposed dilemma that school officials face under the Ninth Circuit's ruling.

STATEMENT OF THE CASE

The facts of this case are representative of a scene repeated daily in schools all across the country.

Bob Camreta, a social services caseworker, and James Alford, a deputy sheriff, arrived at Elk Meadow Elementary School to interview S.G., age nine, in private. *Greene v. Camreta*, 588 F.3d 1011, 1016-17 (9th Cir. 2009). The purpose of the interview was to check on S.G. and her younger sister after their father had recently been arrested and charged, although released on bail, on suspicion of sexually abusing another child. *Id.* at 1016. Camreta and Alford had neither a warrant nor a court order to interview S.G. *Id.* at 1017.

Terry Friesen was a guidance counselor and employee of the Bend LaPine School District (School District). *Id.* She went to S.G.'s classroom and told her that someone had come to the school to talk to her. *Id.* Friesen then showed S.G. to the room where Camreta and Alford were waiting and left. *Id.* Camreta interviewed S.G. for close to two hours while Alford observed. *Id.* The interview confirmed Camreta's suspicion that the father had victimized S.G. too. *Id.* at 1018.

Camreta and Alford, however, were not the only defendants to this action, alleging violation of the Fourth Amendment. *Id.* at 1020 n. 4. The complaint also alleged that the School District and Friesen participated in the "seizure" of S.G. *Id.* But S.G. and her mother failed to preserve their claims against Friesen and the School District on appeal, and so the Ninth Circuit deemed the claims waived. *Id.*

Amici nevertheless urge the Court to remain cognizant of the considerable impact that this case will have for thousands of school districts, and even more school officials. For every request by a caseworker and/or law enforcement officer to interview a potential child abuse victim at school, there will be a school official required to make a decision about how to handle it.

ARGUMENT

I. MERELY ALLOWING ACCESS TO A STUDENT WHO IS A SUSPECTED VICTIM OF CHILD ABUSE DOES NOT CONSTITUTE A SEIZURE BY SCHOOL OFFICIALS.

The threshold inquiry in this case is whether S.G. was "seized" within the meaning of the Fourth Amendment. "A person is 'seized' only when, by means of physical force or a show of authority, [her] freedom of movement is restrained." *United States v. Mendenhall*, 446 U.S. 544, 553 (1980). This concept is best known and most frequently applied in the law enforcement context, where this Court has repeatedly concluded that not all contact between police and

citizens necessarily involves seizures of persons. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 19 n. 16 (1968).

This Court has also emphasized that whether a seizure has occurred must be assessed "in view of all of the circumstances surrounding the incident." *Mendenhall*, 446 U.S. at 554. At least one key factor is the setting of the alleged seizure. For example, "when people are at work their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers." *INS v. Delgado*, 466 U.S. 210, 218 (1984). Likewise, a passenger on a bus set to depart may legitimately feel confined, "but this [is] the result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive." *Florida v. Bostick*, 501 U.S. 429, 436 (1991).

Perhaps no setting is quite as unique as the school environment. Indeed, the Court has already determined that "Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere," owing to the schools' custodial and tutelary responsibility for students. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995). At school, students lack the right to come and go at will and are subject to "a degree of supervision and control that could not be exercised over free adults." *Id.* at 654-55. On this rationale, the Tenth Circuit recently adopted the following standard: "To qualify as a seizure in the school context, the limitation on the student's freedom of movement must significantly exceed that inherent in everyday, compulsory attendance." *Couture v. Board of Educ. of Albuquerque Pub. Schs.*, 535 F.3d 1243, 1251 (10th Cir. 2008).

While the Ninth Circuit concluded that the interview conducted by the child protective services worker in the presence of a police officer constituted a "seizure," it did not have occasion to rule on the constitutionality of the school district official's actions. It did note that neither of the defendants occupied such a role. *Camreta*, 588 F.3d at 1024. Moreover, the interview was not conducted at the School District's request or for the purpose of maintaining discipline in the classroom or on school grounds. *Id.* at 1024-25. The role of the counselor was limited to informing the student that someone had come to the school to talk to her and then showing her to the room where the interview took place. *Id.* at 1017. The school counselor had absolutely no involvement in the interview, either in questioning the student or even sitting in as an observer. *Id.*

If these facts alone constitute a "seizure" of the student, then *amici* are hard pressed to imagine much, if any, contact between a school official and student that would not also constitute a seizure and thereby trigger Fourth Amendment scrutiny. This result is contrary to the Court's long line of cases in the law enforcement context, declining to hold that all contact between police and citizens necessarily involves seizures of persons. So it is particularly ill-suited to the school environment, which "requires close supervision of school children, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985).

Students generally are not at liberty to leave the school campus, or even their assigned classroom, as they please, to say nothing of such common practices as keeping a student from recess to complete

an unfinished assignment, sending a student to the principal's office, or giving a student after school detention. Furthermore, "no one wishes to substitute courts for school boards, or to turn the judge's chambers into the principal's office." *Morse v. Frederick*, 551 U.S. 393, 428 (2007) (Breyer, J., concurring in the judgment and dissenting in part).

To the extent that a student reasonably believed to be a victim of child abuse is interviewed by law enforcement or child protective service workers is seized at all, school district and school personnel who make the child available for such an interview at school are not implicated. *Amici* urge this Court to so find.

II. IMPLICATING SCHOOL DISTRICTS AND OFFICIALS IN SUCH A "SEIZURE" PLACES THEM IN AN UNTENABLE POSITION.

Amici generally oppose any disruption of or interference with the school day and environment, especially when it involves removing students from the classroom and learning activities. *Amici* do, however, regard student safety and welfare as a high priority. As part of their obligations in promoting student safety and welfare, school personnel well understand their responsibility as mandated reporters under the child abuse laws in every state.[2]

---

[2] U.S. Department of Health and Human Services Administration for Children and Families, *Mandatory Reporters of Child Abuse and Neglect: Summary of State Laws* (2010), *available at* http://www.childwelfare.gov/systemwide/laws_policies/statute/manda.cfm

In fact, school personnel are often the first people to notice that a child may be the victim of abuse or neglect. School employees who fail to report child abuse can be charged with a crime, fined, and lose their jobs. For these reasons and out of a sense of moral obligation, school district employees take seriously their responsibility to notice and report suspected child abuse. Given this critical role in the process of identifying suspected abuse and minimizing its negative effect upon children, school officials understand why caseworkers and law enforcement officers might seek access to potential abuse victims at school. School is a familiar environment for students and may be one of the few safe locations for an abuse victim, particularly if the victim resides with the abuser. In addition, given their role as mandated reporters, turning away a child abuse investigator would, in some respects, seem counterintuitive to many school employees. After all, these are the people school employees are required to notify if they suspect a child has been the victim of abuse.

A number of states already recognize the benefits of interviewing potential abuse victims at school. States like Florida, Oregon, and South Carolina, for example, mention school as a possible and even preferred interview site. *See, e.g.*, Fla. Stat. Ann. § 39-301(19) (West 2010); Or. Rev. Stat. Ann. § 419B.045 (West 2010); S.C. Code Ann. § 63-7-920(C) (2010). Still more states give caseworkers and law enforcement officers the right to interview children at school while necessarily forbidding school officials from denying such access. *See, e.g.*, Cal. Penal Code § 11174.3(a) (West 2010); Iowa Code Ann. § 232.71B(6) (West 2010); Kan. Stat. Ann. § 38-2226(g) (West

2010); La. Child. Code Ann. art. 612(A)(2) (2010); Me. Rev. Stat. Ann. tit. 22, § 4021(3) (2010); N.H. Rev. Stat. Ann. § 169-C:38, IV (2010).

By making schools a preferred location for interviewing children suspected of being abused or by granting caseworkers and law enforcement officers the right to interview these children at school, these statutes presume that there are no Fourth Amendment implications to be considered when such interviews occur. This presumption is apparent given that none of these state statutes require case workers or police to have a warrant or court order before gaining access to students at school for interviews; nor do they refer to any responsibility on the part of school officials to assess the constitutionality of such an interview before allowing it to take place. Some, as noted, affirmatively prohibit school officials from denying law enforcement officers and child protective service workers access to children.[3] If the Ninth Circuit's ruling is correct, then in some cases, these laws would be instructing school officials to allow unconstitutional seizures by other government agencies to occur on school grounds, calling into question the validity of these provisions.

If the presumption underlying these statutes is incorrect and school districts and officials are potentially implicated in a "seizure" merely by allowing access to a student, then they are cast in the very uneasy and ultimately untenable role of

---

[3] *See* Kan. Atty. Gen. Op. No. 05-10, 2005 WL 751938 (Kan. A.G. 2005) (indicating that under state law school official could refuse to permit a law enforcement officer to interview a pupil on school property in connection with a criminal investigation where the pupil may be a potential witness but could not do so if the investigation involved child abuse or neglect).

gatekeeper. To avoid potential Fourth Amendment liability, school officials will have to satisfy themselves that the caseworker and/or police officer have sufficient legal basis and justification for the "seizure" before allowing access, even though no such responsibility is contemplated by the statutes that make schools the preferred location for such interviews to take place. Even assuming that a school official is able to make the determination that sufficient legal basis exists to allow the interview, this does not insulate the official or the school district from a lawsuit brought by parents asserting that the determination was in error and consequently the interview was an unconstitutional seizure.

The very role of gatekeeper into which the Ninth Circuit's opinion casts school officials will in some cases place them in direct defiance of state laws that forbid school officials from denying access to children at school. And the role is certainly not without its complications for school officials in the remaining states either. School officials understand school rules, and may even have a "layman's familiarity with the types of crimes that occur frequently in our schools." *T.L.O.*, 469 U.S. at 350 n.1 (Powell, J., concurring). They are not, however, police officers and "have no law enforcement responsibility or indeed any obligation to be familiar with the criminal laws." *Id.* Moreover, "[a] teacher has neither the training nor the day-to-day experience in the complexities of probable cause that a law enforcement officer possesses, and is ill-equipped to make a quick judgment about the existence of probable cause." *Id.* at 353 (Blackmun, J., concurring). While the presentation of a warrant or court order might relieve that burden for some school

officials, there are others who would feel uncomfortable even having to make an assessment as to the validity of those documents. Certainly, very few, if any school officials would, in the absence of such documents, feel qualified to make a determination as to the existence of exigent circumstances that might form the asserted basis for the request to interview the student. Even if some less stringent Fourth Amendment standard, such as reasonable suspicion, applied to such interviews, school officials would be ill-equipped to make such determinations with respect to the actions of outside government agencies. It is true that many school officials have the necessary understanding, experience and familiarity with their students and school communities to determine whether reasonable suspicion exists as to prohibited conduct by students on school grounds, but that is a far cry from having to evaluate whether that standard is met by the evidence presented by a child protective services worker or police officer to justify a request to interview a child at school.

Even assuming that school officials received the right training and experience to make such assessments of constitutionality under the Fourth Amendment, school officials would have to rely on the caseworker and/or police officers to supply the necessary information since the school official making the determination would in most instances have no independent knowledge of the underlying facts surrounding the suspected abuse. But various states' laws deem this information strictly confidential and may prohibit such an exchange. *See, e.g.*, Ark. Code Ann. § 12-18-501 (2010); Cal. Penal Code § 11167.5 (West 201); Conn. Gen. Stat. Ann. § 17a-101k (West

2010); Ga. Code Ann. § 49-5-44 (West 2010); Haw. Rev. Stat. § 350-1.4 (2010); Iowa Code Ann. § 235A.17 (West 2010); La. Child. Code Ann. art. 616 (2010); Neb. Rev. Stat. Ann. § 28-725 (2010); N.J. Stat. Ann. § 9:6-8.10a (West 2010); Pa. Cons. Stat. Ann. tit. 23, § 6339 (2010); R.I. Gen. Laws § 42-72-8 (2010); S.C. Code Ann. § 63-7-1990 (2010); S.D. Codified Laws § 26-8A-13 (2010); W. Va. Code § 15-13-5 (2010); Wyo. Stat. Ann. § 14-3-214 (2010). Even in the absence of a confidentiality law, the caseworker and/or police officer may understandably be reluctant or unwilling to share much, if any, information or sources in order to preserve the integrity of a still developing investigation.

The free sharing of information, however, does not necessarily resolve all concerns. In coming to the school and requesting to interview a student, the caseworker and/or police officer presumably believe that there is sufficient legal basis and justification for the "seizure." Under the Ninth Circuit's ruling, the presentation of a warrant or court order might give a school official at least some confidence in allowing the interview. But in the absence of such legal assurances, a school official who remains unsure or disagrees that there is sufficient legal basis and justification should deny the request, both to protect the student's constitutional rights and to limit the school official's potential liability. This creates a real dilemma for the typical school official, who has an engrained concern for student safety and welfare and may wish to cooperate with other entities he or she perceives to share this concern; yet by acting in a prudent and responsible manner by denying the interview that he or she believes is unconstitutional, ironically the school official risks becoming a

scapegoat if the student is in fact being abused and continues to be victimized.

In addition, the school official who resists providing access to the child also puts himself, perhaps reluctantly, at odds with the caseworker and/or police officer, and thereby opens himself to exposure of another kind—criminal prosecution. Most states have laws that criminalize conduct viewed as delaying, obstructing, or interfering with an investigation. *See, e.g.*, Ala. Code § 13A-10-2 (2010); Ark. Code Ann. § 5-54-102 (West 2010); Cal. Penal Code § 148 (West 2010); Colo. Rev. Stat. § 18-8-104 (West 2010); Conn. Gen. Stat. Ann. § 53a-167a (West 2010); Fla. Stat. Ann. § 843.06 (West 2010); Ga. Code Ann. § 16-10-24 (West 2010); Idaho Code Ann. § 18-705 (2010); Mass. Gen. Laws Ann. ch. 268, § 24 (2010); Minn. Stat. Ann. § 609.50 (West 2010); Mont. Code Ann. § 45-7-302 (2010); Neb. Rev. Stat. Ann. § 28-906 (2010); N.C. Gen. Stat. Ann. § 14-223 (West 2010); Ohio Rev. Code Ann. § 2921.31 (West 2010); Okla. Stat. Ann. tit. 21, § 540 (2010); Or. Rev. Stat. Ann. § 162.247 (West 2010); R.I. Gen. Laws § 11-32-1 (2010); S.D. Codified Laws § 22-11-6 (2010); Tenn. Code Ann. § 39-16-602 (West 2010); Tex. Penal Code Ann. § 38.15 (West 2010); Utah Code Ann. § 76-8-301 (West 2010); Vt. Stat. Ann. tit. 13, § 3001 (2010); Wash. Rev. Code Ann. § 9A.76.020 (2010); W. Va. Code § 61-5-14 (2010); Wis. Stat. Ann. § 946.41 (West 2010); Wyo. Stat. Ann. § 6-5-204 (2010). So in denying a caseworker and/or police officer access to a student, a school official runs the real risk of criminal prosecution.

Moreover, if school districts and officials are implicated in the "seizure," they likely have an obligation to monitor its scope for reasonableness. For example, if an interview is on the precipice of going too long (an inherently subjective determination), then the school official should intervene and call an end to the questioning, again both to protect the student's constitutional rights and to limit the school official's potential liability. But this, too, is a recipe for confrontation with the caseworker and/or police officer with the same or greater risk of criminal prosecution for appearing to delay, obstruct, or interfere with the investigation.

CONCLUSION

School officials who, often in compliance with state statutes, grant the requests of police officers and child protective services workers to interview a child who is suspected of being abused have not participated in any "seizure" of that child. To rule otherwise would be contrary to public policy that encourages schools to act in a manner that protects the safety and welfare of the children in their care and would place school districts in an untenable legal position. For these reasons, *Amici* request the Court to consider carefully the legal standards that should apply to interviews of suspected child abuse victims

at school and to provide the clarity necessary so that schools may carry out their responsibilities without undue concern that their actions are placing themselves or these children at further risk.

Respectfully submitted,

Francisco M. Negron, Jr.*
General Counsel
National School Boards Association
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

Matthew W. Wright
David K. Pauole
Holm Wright Hyde & Hays PLC
10429 South 51st Street, Suite 285
Phoenix, AZ 85044
(480) 961-0040

*Counsel of Record

December 17, 2010

Nos. 09-1454 and 09-1478

In The Supreme Court of the United States

BOB CAMRETA, PETITIONER,

v.

SARAH GREENE, PERSONALLY AND AS NEXT FRIEND FOR S.G., A MINOR, AND K.G., A MINOR, RESPONDENTS.

JAMES ALFORD, PETITIONER,

v.

SARAH GREENE, ET AL., RESPONDENTS.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NEW YORK UNIVERSITY SCHOOL OF LAW FAMILY DEFENSE CLINIC, COLUMBIA LAW SCHOOL CHILD ADVOCACY CLINIC, THE BRONX DEFENDERS, THE BROOKLYN FAMILY DEFENSE PROJECT, AND THE CENTER FOR FAMILY REPRESENTATION, INC., AS AMICI CURIAE SUPPORTING RESPONDENTS

MARTIN GUGGENHEIM
CHRISTINE GOTTLIEB
NEW YORK UNIVERSITY SCHOOL OF LAW FAMILY DEFENSE CLINIC
245 Sullivan St.
New York, NY 10012
Telephone: (212) 998-6460
Email: guggenh@exchange.law.nyu.edu

CHARLES L. KERR
Counsel of Record
MARK DAVID MCPHERSON
ADAM JACKSON HEINTZ
HEIDI JOHANNS
MORRISON & FOERSTER LLP
1290 Avenue of the Americas
New York, NY 10104
Telephone: (212) 468-8000
Email: ckerr@mofo.com

Counsel for Amici Curiae

JANUARY 31, 2010

[Additional Counsel Listed On The Inside Cover]

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Susan Jacobs
Center for Family
Representation, Inc.
116 John St.
19th Floor
New York, NY 10038
Telephone: (212) 691-0950
Email: sjacobs@cfrny.org

Lauren Shapiro
Brooklyn Family
Defense Project
177 Livingston St.
7th Floor
Brooklyn, NY 11201
Telephone: (347) 592-2500
Email:
lshapiro@bfdp.ls-nyc.org

Jane M. Spinak
Columbia Law School
Child Advocacy Clinic
Rm. 205, William Warren Hall
410 W. 116th St.
New York, NY 10027
Telephone: (212) 854-3857
Email:
spinak@law.columbia.edu

Kara Finck
The Bronx Defenders
860 Courtlandt Ave.
Bronx, NY 10451
Telephone: (718) 838-7839
Email:
karaf@bronxdefenders.org

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT 7

I. REQUIRING PARENTAL CONSENT OR JUDICIAL REVIEW BEFORE DETAINING AND QUESTIONING A CHILD CONCERNING SEXUAL ABUSE ALLEGATIONS IS THE ONLY WAY TO VINDICATE A FAMILY'S CONSTITUTIONALLY PROTECTED PRIVACY AND LIBERTY INTERESTS 7

A. The Detention And Interrogation Of A Child Concerning Sexual Abuse Implicates That Child's Fourth Amendment Rights And A Family's Constitutionally Protected Privacy And Liberty Interests 7

B. Children's And Parents' Expectation Of Privacy In Their Family Relationships And Child-Rearing Extends To Schools 15

II. MAGISTRATES—NOT CHILD WELFARE CASEWORKERS—SHOULD BALANCE THE LEGAL RIGHTS AND POTENTIAL HARMS TO CHILDREN TO DECIDE WHEN TO CIRCUMVENT PARENTAL CONSENT 17

TABLE OF CONTENTS—Continued

Page

A. A Neutral, Detached, And Expert Arbiter Is Crucial When Weighing The Important Legal Rights And Potential Harms In Child Abuse Cases 19

B. Child Welfare Caseworkers Should Not Be The Arbiters Of Children's Constitutional Rights 21

C. Interrogations Of Children Concerning Alleged Sexual Abuse Are Extremely Intrusive And Can Be Permanently Damaging 26

D. Requiring Judicial Review When Parents Are Not Consulted Would Not Hinder Investigations Of Child Abuse 32

1. Judicial Review Would Rarely Be Necessary Because Parents Usually Consent To Interviews 32

2. Non-Abusive Parents Like Sarah Greene Play A Crucial Role In The Investigative And Recovery Process 33

3. Many States Already Require Judicial Review Before Children Who Are Suspected Victims Of Sexual Abuse Are Seized Without Parental Consent Or Evidence Of Exigent Circumstances 36

CONCLUSION 37

TABLE OF AUTHORITIES

Page

CASES:

Bd. of Educ. v. Earls, 536 U.S. 822 (2002).....15

Calabretta v. Floyd, 189 F.3d 808 (9th Cir. 1999).....37

California v. Ciraolo, 476 U.S. 207 (1986).....8

Camara v. Municipal Court of San Francisco, 387 U.S. 523 (1967).....32, 33

City of Ontario v. Quon, 560 U.S. ___, 130 S. Ct. 2619 (2010).....8

Davis v. Mississippi, 394 U.S. 721 (1969).....19

Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977).....9

Florida v. Riley, 488 U.S. 445 (1989).....14

Franz v. Lytle, 997 F.2d 784 (10th Cir. 1993).....27

Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009).....19, 26, 34

Groh v. Ramirez, 540 U.S. 551 (2004).....20

Hayes v. Florida, 470 U.S. 811 (1985).....19

Johnson v. United States, 333 U.S. 10 (1948).....19, 20

Katz v. United States, 389 U.S. 347 (1967).....*passim*

Kaupp v. Texas, 538 U.S. 626 (2003).....19

Kyllo v. United States, 533 U.S. 27 (2001).....8

Langnes v. Green, 282 U.S. 531 (1931).....19

Lawrence v. Texas, 539 U.S. 558 (2003).....16

TABLE OF AUTHORITIES—Continued

Page

M.L.B. v. S.L.J., 519 U.S. 102 (1996) 10

Meyer v. Nebraska, 262 U.S. 390 (1923) 10

New Jersey v. T.L.O., 469 U.S. 325 (1985) 15, 16

Nicholson v. Williams, 203 F. Supp. 2d 153 (E.D.N.Y. 2002) 34

Parham v. J.R., 442 U.S. 584 (1979) 13

Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) ... 9, 10, 11

Prince v. Massachusetts, 321 U.S. 158 (1944) 10

Rakas v. Illinois, 439 U.S. 128 (1978) 14

Rutan v. Republican Party of Ill., 497 U.S. 62 (1990) 19

Safford Unified Sch. Dist. #1 v. Redding, 557 U.S. ___, 129 S. Ct. 2633 (2009) 8, 15, 18, 36

SEC v. Chenery Corp., 318 U.S. 80 (1943) 19

Smith v. Phillips, 455 U.S. 209 (1982) 19

Stanley v. Illinois, 405 U.S. 645 (1972) 9

Tenenbaum v. Williams, 193 F.3d 581 (2d Cir. 1999) 28, 37

Terry v. Ohio, 392 U.S. 1 (1968) 21

Troxel v. Granville, 530 U.S. 57 (2000) 9, 14, 36

United States v. Mendenhall, 446 U.S. 544 (1980) 21

Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) 15, 16

TABLE OF AUTHORITIES—Continued

Page

Wainwright v. Witt, 469 U.S. 412 (1985) 19

Williams v. Norris, 25 U.S. 117 (1827) 19

Winkelman v. Parma City Sch. Dist., 550 U.S. 516 (2007) 10

Wisconsin v. Yoder, 406 U.S. 205 (1972) 10

STATUTES AND RULES:

Ala. Admin. Code r. 660-5-34-.02(1)(d) 20

Colo. Rev. Statutes § 19-3-308(3)(b) 21

Ind. Code § 31-33-8-7 21

N.H. Rev. Stat. Ann. § 169-C:34(VI) 21

Or. Rev. Stat. Ann. § 336.465 ..... 12, 17

Supreme Court Rule 37.3(a) 1

Supreme Court Rule 37.6 1

OTHER AUTHORITIES:

Am. Acad. of Child & Adolesc. Psychiatry, *Guidelines for the Clinical Eval. for Child & Adolesc. Sexual Abuse* (modified Dec. 1990), available at http://www.aacap.org/cs/root/policy_statements/guidelines_for_the_clinical_evaluation_for_child_and_adolescent_sexual_abuse 28

TABLE OF AUTHORITIES—Continued

Page

Annie E. Casey Foundation, *The Unsolved Challenge of System Reform: The Condition of the Frontline Human Services Workforce* (2003), available at http://www.aecf.org/upload/publicationfiles/the%20unsolved%20challenge.pdf 24

Bend Police Dep't, *Prof'l Career Opportunities*, available at http://www.ci.bend.or.us/depts/police/employment/patrol_officer.html 23

Betty Joyce Carter, *Who's to Blame?: Child Sexual Abuse and Non-Offending Mothers* (1999) 36

Child Welfare League of America, Child Welfare Workforce, *Research Roundup* (Sept. 2002), available at http://www.cwla.org/programs/r2p/rrnews0209.pdf 23

Christina Risley-Curtiss & Kristin Heffernan, *Gender Biases in Child Welfare*, 18 Affilia 395 (2003) 25

Ctr. for Improvement of Child & Fam. Servs. Portland State Univ., Sch. of Soc. Work, *DHS Training*, available at http://www.ccf.pdx.edu/cwp/pgCWP_dhs_training.php 23

Cynthia D. Silverstein & Germaine M. Buck, *Parental Preferences Regarding Sex Education Topics for Sixth Graders*, 21 Adolesc. 971 (1986) 11

David Rigsby, *Educ. Law Chapter: Sex Educ. in Schools*, 7 Geo. J. Gender & L. 895 (2006) 12

TABLE OF AUTHORITIES—Continued

Page

Doreen A. Rosenthal and Shirley Feldman, *The Importance of Importance: Adolescents' Perceptions of Parental Communication About Sexuality*, 22 J. of Adolesc. 835 (1999) 11

Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 Wm. & Mary L. Rev. 413 (2005) 26, 32

Frank W. Putnam, M.D., *Ten-year Research Update Review: Child Sexual Abuse*, 42 J. Am. Acad. Child & Adolesc. Psychiatry 269 (2003) 12

Jacqueline Corcoran & Vijayan Pillai, *A Meta-Analysis of Parent-Involved Treatment for Child Sexual Abuse*, 18 Research on Social Work Practice 453 (2008) 13

James Jaccard, *et al.*, *Parent-Adolescent Communication About Sex and Birth Control: A Conceptual Framework*, 97 New Directions For Child & Adolesc. Dev. 9 (2002) 11

Jan Breckenridge and Eileen Baldry, *Workers Dealing with Mother Blame in Child Sexual Assault Cases*, 6 J. of Child Sexual Abuse 65 (1997) 36

John E.B. Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases I* (2005) 29

Joseph Goldstein, *et al.*, *Before the Best Interests of the Child* 25 (The Free Press, 1979) 27

TABLE OF AUTHORITIES—Continued

Page

Kenneth J. Lau, *et al.*, *Mandated Reporting of Child Abuse and Neglect: A Guide for Social Workers* 18 (Springer Publ'g Co., New York 2009) 24

Lindsey E. Cronch, *et al.*, *Forensic Interviewing in Child Sexual Abuse Cases: Current Techniques and Future Directions*, 11 Aggression & Violent Behavior 195 (2006) 29, 30

NASW, *If You're Right for the Job, It's the Best Job in the World* (June 2004), available at http://www.naswdc.org/practice/children/NASWChildWelfareRpt062004.pdf 25

NASW, *Professional Standards*, available at http://www.helpstartshere.org/ 25

Nat'l Council of Juvenile & Family Court Judges Family Violence Dep't, *Effective Intervention in Domestic Violence & Child Maltreatment Cases: Guidelines for Policy & Practice* (1999) 35

Olive Stevenson, *Foreword*, *Child Abuse & Child Abusers: Protection and Prevention*, *Research Highlights in Social Work* 24 (Lorraine Waterhouse ed., 1993) 35

Oregon Dep't of Human Servs., Children, Adults & Families, *Mandatory Child Welfare Staff Training Program—Policy*, Policy No. III-E.5.1.1 (Effective Jan. 6, 2003), available at http://www.dhs.state.or.us/policy/childwelfare/manual_3/iii-e511.pdf 23

TABLE OF AUTHORITIES—Continued

Page

Oregon Dep't of Public Safety Standards & Training, *DPSST Strategic Plan 2007-09 Biennium*, http://www.oregon.gov/DPSST/StrategicPlan200709.shtml 23

Sandra Bass, *et al.*, *Children, Families, and Foster Care: Analysis and Recommendations*, 14 The Future of Children 5 (2004), available at http://futureofchildren.org/futureofchildren/publications/docs/14_01_01.pdf 22

Sandra Stukes Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*, 14 The Future of Children 75 (2004), available at http://futureofchildren.org/futureofchildren/publications/docs/14_01_04.pdf 24, 25

Steven Herman, *Improving Decision Making in Forensic Child Sexual Abuse Evaluations*, 29 Law & Human Behavior 87 (2005) 30

U.S. Dep't of Health & Human Servs., Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, *Child Maltreatment* (2008), at 23, available at http://www.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf 31

Vivek Sankaran, *Wells Conference on Adoption Law: Judicial Oversight Over The Interstate Placement of Foster Children*, 38 Cap. U.L. Rev. 385 (2009) 22

TABLE OF AUTHORITIES—Continued

Page

West Virginia, Child Protective Services Policy 3.4 & 3.5 (Rev. July 10, 2008), available at http://www.wvdhhr.org/bcf/children_adult/cps/policy/CPSPolicy7_10_08_1.pdf 21

BRIEF FOR THE NEW YORK UNIVERSITY SCHOOL OF LAW FAMILY DEFENSE CLINIC, COLUMBIA LAW SCHOOL CHILD ADVOCACY CLINIC, THE BRONX DEFENDERS, THE BROOKLYN FAMILY DEFENSE PROJECT, AND THE CENTER FOR FAMILY REPRESENTATION, INC. AS AMICI CURIAE SUPPORTING RESPONDENTS

The New York University School of Law Family Defense Clinic, Columbia Law School Child Advocacy Clinic, The Bronx Defenders, The Brooklyn Family Defense Project, and The Center for Family Representation, Inc., respectfully submit this brief as amici curiae in support of Respondents.[1]

INTEREST OF AMICI CURIAE

Amici are academics and service providers who collectively represent thousands of families each year in New York City. We have published dozens of articles and books on the child welfare system and have trained hundreds of young lawyers and social workers to represent and serve families. We submit this brief because it is our firm belief, supported by many years

[1] Pursuant to Supreme Court Rule 37.3(a), blanket letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. In addition, pursuant to Supreme Court Rule 37.6, no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

of experience with thousands of families, that it is essential to mandate the review of a neutral magistrate prior to the nonemergency interrogation of a young child at school about intimate sexual topics. Without such review, the child protection system will inflict certain harm to the rights and well-being of the very children that it seeks to help.

Established in 1990, the **New York University School of Law Family Defense Clinic (the "Clinic")** was the first law school clinic in the country to train students to represent parents accused of child abuse and neglect and prevent the unnecessary break-up of indigent families. A pioneer of interdisciplinary representation in the field, the Clinic teaches law and graduate-level social work students to collaborate to protect family integrity and help families access services that keep children safe and out of foster care.

Under supervision, Clinic students represent parents in New York City Family Courts in child abuse and neglect and termination of parental rights proceedings.

Clinic faculty teach, research, and write in the field of child welfare, advocate for policy reform, and train and provide technical support to parent advocates across the country.

The **Child Advocacy Clinic ("CAC") at Columbia Law School** has provided representation to children in the child welfare system for almost thirty years. The CAC has a long history of developing tangible ways in which law school students and faculty can contribute to child and family advocacy in

New York and throughout the country. Students in the CAC have represented individual clients in Family Court, other trial level courts, and in the Appellate Division of the New York Supreme Court, participated in impact litigation, lobbied for reform on the city and state levels, drafted legislation and regulations, organized lectures and conferences, and provided background papers and other research for policy makers, legislators and judges.

The Bronx Defenders employs a groundbreaking system of holistic defense to fight both the causes and consequences of involvement in the child welfare and criminal justice systems. Located in the heart of the South Bronx, its interdisciplinary legal teams of criminal, civil, and family defense lawyers, social workers, parent advocates, investigators, and community organizers advocate for clients in Family, Civil and Criminal Court. In 2007, The Bronx Defenders Family Defense Practice became the first institutional provider of holistic representation on behalf of parents in the Bronx. Since then, it has represented thousands of parents accused of neglect or abuse in Bronx Family Court. At the trial and appellate level, it litigates the illegal and improper removal of children from their parents and fights for families to be reunited.

The Brooklyn Family Defense Project ("BFDP") is an interdisciplinary office of Legal Services NYC, one of the largest providers of free civil legal services in the country. In 2007, BFDP was granted the first-ever contract from the City of New York to provide legal defense to Brooklyn parents accused of child

abuse and neglect, taking on representation of over 870 new respondents each year. It has a current case load of over 1,600 families. BFDP integrates social workers into its legal practice in order to ensure clients receive effective social services and support. In addition to its Family Court practice, BFDP has an appellate practice that addresses critical issues of constitutional and statutory law, and engages in systemic advocacy that has resulted in significant improvement in child welfare policy in New York City. On a daily basis, BFDP is charged with protecting the rights of low income families to family integrity and privacy against unwarranted state intervention in their lives.

The Center for Family Representation, Inc. ("CFR") is a law and policy organization tasked with representing over 1,000 parents per year in child abuse and neglect proceedings in the City of New York. To help strengthen families and keep children out of foster care, CFR has developed an innovative model of representation that provides each client with a team that includes a lawyer, a social worker, and a parent advocate. Parent advocates have personal experience as the subjects of child protection investigations, which they draw on to effectively support and engage parents currently involved with child protection proceedings. This model has drawn national attention and is being adopted in other states.

CFR is also a training center for a wide range of practitioners in the field of child protection, including judges, social service providers, caseworkers, and lawyers for children, parents, and the government.

SUMMARY OF THE ARGUMENT

This case poses the traditional Fourth Amendment inquiry—whether a search and seizure is unreasonable—in a unique context. Although the Court has limited children's Fourth Amendment protections when they are at school and are suspected of breaking rules, the Court's prior school search cases have never tested the intersection between the Fourth Amendment and a family's constitutionally protected privacy and liberty interests, which are directly implicated in this case. The interrogation at issue forced a nine-year-old, elementary school child to respond to intimate sexual questions without evidence of an emergency, review by a neutral magistrate, or permission from her mother—against whom no allegation of abuse has ever been made. The interrogation therefore raises important concerns about the reasonableness of questioning and confronting a young child about sexual activity, an intimate subject that this Court—and our society—has generally left to the family to control. Because families have constitutionally protected privacy and liberty interests in controlling how their children are exposed to such an intimate topic as sex and sexual abuse, the Fourth Amendment must be read to recognize and validate such privacy interests.

Perhaps most importantly, amici urge the Court to consider the full implications of a contrary reading of the Fourth Amendment in this context. Reading the Fourth Amendment to permit the type of search and detention at issue here, without either parental

consent or approval by a neutral magistrate, would not only ignore a family's constitutionally protected privacy and liberty interests. It would also grant unfettered authority to child welfare caseworkers to conduct interrogations of children concerning sexual abuse. In a number of ways, such a grant of authority would frustrate the state's own interests here, subjecting millions of children to incalculable and irreversible damage.

First, although they perform an admirable task, child welfare caseworkers are widely acknowledged to suffer from chronic turnover, limited supervision, and insufficient training. They do not have the training, expertise or certification required of judges, doctors, psychologists, police or social workers. In the experience of the amici, they frequently offer inaccurate or even harmful assessments based on these deficiencies as well as their lack of neutrality.

Second, abrogating traditional Fourth Amendment requirements would endanger many children, by removing them from the protection and support of non-abusive parents like Sarah Greene at an extremely vulnerable time. Children have a constitutional right to have their parents make key child-rearing decisions at such a traumatic juncture. Moreover, research has demonstrated that non-abusive parents play a crucial role in the reporting and subsequent treatment of child sexual abuse. In fact, parents are usually the parties most motivated to investigate and treat child sexual abuse. Unless there is evidence of an emergency, child protective caseworkers should

not be empowered to ignore non-abusive parents while simultaneously circumventing the review of a neutral magistrate.

This Court should therefore affirm the Ninth Circuit's holding that a neutral magistrate must be consulted before a child welfare caseworker and police officer can interrogate a young child, at school, when there is no emergency and when her parents have not consented to the search. As detailed below, that ruling follows the historic mandate of the Fourth Amendment to protect against unreasonable searches and seizures, while still enabling the state to pursue the vital work of investigating reported sexual abuse of children.

ARGUMENT

I. REQUIRING PARENTAL CONSENT OR JUDICIAL REVIEW BEFORE DETAINING AND QUESTIONING A CHILD CONCERNING SEXUAL ABUSE ALLEGATIONS IS THE ONLY WAY TO VINDICATE A FAMILY'S CONSTITUTIONALLY PROTECTED PRIVACY AND LIBERTY INTERESTS.

A. The Detention And Interrogation Of A Child Concerning Sexual Abuse Implicates That Child's Fourth Amendment Rights And A Family's Constitutionally Protected Privacy And Liberty Interests.

1. The Fourth Amendment has long protected those privacy interests that society recognizes as

reasonable. In *Katz*, this Court first used the phrase "reasonable expectation of privacy" to demarcate the areas to which the Fourth Amendment's protection extends. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) ("a person has a constitutionally protected reasonable expectation of privacy"). Since *Katz*, whether one has a "reasonable expectation of privacy" in a particular setting or concerning a particular interest has been a central measure of whether Fourth Amendment protections apply. *See, e.g., Kyllo v. United States*, 533 U.S. 27, 35-36 (2001); *City of Ontario v. Quon*, 560 U.S. ___, 130 S. Ct. 2619, 2629 (2010). This has been no less true when the Court has measured the reasonableness of school house searches. *See Safford Unified Sch. Dist. #1 v. Redding*, 557 U.S. ___, 129 S. Ct. 2633, 2641 (2009) (holding that "both subjective and reasonable societal expectations of personal privacy support the treatment of such a [strip] search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings"). As the Court explained in *California v. Ciraolo*, "*Katz* posits a two-part inquiry: first, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize that expectation as reasonable?" 476 U.S. 207, 211 (1986).

2. Amici submit that the state here intruded into an area that is not just recognized by society as private, but enshrined as such. When the state's

agents interrogated a young child, at school, about sexual conduct and about her family, they were reaching into an area that Americans deem deeply private. This Court's decisions have long acknowledged society's recognition of a family's expectation of privacy in this area of their lives.

Long before *Katz* was decided, the Court recognized parents and children's fundamental right to have parents control the essential decisions about a child's care, custody, upbringing, and education. *See, e.g.*, *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925) ("The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only"); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) ("the interest of [parents] in the companionship, care, custody and management of [their] children" is significant; "The rights to conceive and raise one's children [are] 'essential,' among the 'basic rights of man,' and are 'rights far more precious . . . than property rights'") (citing cases and quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)); *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

Though often articulated as the *parent*'s right to make decisions concerning a child's care, custody, upbringing, and education, the right is a reciprocal one, belonging to the child as much as the adult. *See, e.g.*, *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) (reasoning that the "right to the preservation of family integrity encompasses the reciprocal

rights of both parent and children"); *and cf. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 531-32 (2007) (describing the rights of parents and children in a different context as "intertwined"); *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944) (noting that family religious practice involves both the "rights of children to exercise their religion, and of parents to give them religious training" and describing rights protected in *Pierce* to encompass both parents and children).

This right—shared by parents and children alike—is not just recognized as legitimate; it is recognized as fundamental to our society. "Choices about marriage, family life, and the upbringing of children are among associational rights [the Supreme] Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect." *M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (internal citation omitted); *see also Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *see also, e.g., Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) ("the right of the individual to . . . establish a home and bring up children . . . " is a privilege "long recognized at common law as essential to the orderly pursuit of happiness by free men");

Pierce, 268 U.S. at 535 ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations").

3. A family's fundamental right to control its family life and the upbringing of its children necessarily encompasses the right to control how and when to discuss with the family's children sex and sexual relations. Decisions about introducing children to sexual information are important, value-laden child-rearing choices. *See, e.g.*, Doreen A. Rosenthal and Shirley Feldman, *The Importance of Importance: Adolescents' Perceptions of Parental Communication About Sexuality*, 22 J. of Adolesc. 835 (1999) ("Parents, in particular, have been urged to play a pivotal role in the sex education of their children, in part because of their primary role in preparing young people for adult life and because sexuality brings with it questions of values and morality"); James Jaccard, *et al.*, *Parent-Adolescent Communication About Sex and Birth Control: A Conceptual Framework*, 97 New Directions For Child & Adolesc. Dev. 9, 27 (2002) ("studies indicate individual differences in the topics that parents think should be discussed with their adolescents"); Cynthia D. Silverstein & Germaine M. Buck, *Parental Preferences Regarding Sex Education Topics for Sixth Graders*, 21 Adolesc. 971 (1986) (noting wide variation among parents about the propriety of discussing twelve different sensitive topics during communication about sex and sexuality). How to

introduce sexual information to young children, what language to use, what information to provide, under what circumstances, and with what moral or religious context, are therefore complicated issues central to the constitutionally protected sphere of parental care of children. For this reason, Oregon, like most other states, has recognized that there is a strong interest in parental decision-making with respect to the introduction of sexual topics to children. *See* Or. Rev. Stat. Ann. § 336.465 (providing parents with a right to notice of "any instruction on human sexuality," to review the curricula in advance of such instruction, and to prevent their children from participating in sex education even when enrolled in public institutions); *see also* David Rigsby, *Educ. Law Chapter: Sex Educ. in Schools*, 7 Geo. J. Gender & L. 895, 898 (2006) ("Of the thirty-two states that require or permit sex education, twenty-five states' statutes contain opt-out or opt-in provisions") (citing statutes).

Children's interests in having their parents make decisions regarding the introduction of sexually explicit information is only heightened where, as here, there are suspicions that the child has been sexually abused. At such times, in addition to the concerns typically related to introducing sexual subject matter, the child is entitled to have a parent decide how to handle what might be the most traumatic event of the child's life. Indeed, researchers have noted that treatments involving a non-abusive parent "are currently the best documented, effective treatments" for sexual abuse in children. Frank W.

Putnam, M.D., *Ten-year Research Update Review: Child Sexual Abuse*, 42 J. Am. Acad. Child & Adolesc. Psychiatry 269 (2003); *see also* Jacqueline Corcoran & Vijayan Pillai, *A Meta-Analysis of Parent-Involved Treatment for Child Sexual Abuse*, 18 Research on Social Work Practice 453, 454 (2008) (surveying research and concluding that "parent-involved treatment for sexual abuse in children has been regarded as one, if not the best, available treatment for child sexual victimization").

4. In this sense, the factual context at issue here is analogous to cases involving medical decision-making, which, throughout U.S. history, the common law has left to parents to control. The reasons caretaking responsibility generally rests with parents—that parents typically know their children best, love them most deeply, are best motivated and situated to determine how to address their individual needs, *see Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("historically it has [been] recognized that natural bonds of affection lead parents to act in the best interests of their children")—make it particularly important that parents be the ones to make decisions at such a crucial juncture in a child's life, as when a child is questioned about allegations of sexual abuse.

5. Fourteenth Amendment rights and common law rights to medical decision-making are, of course, distinct from Fourth Amendment rights. But this country's jurisprudence on fundamental family rights illustrates that the privacy interests at stake here are well-established, and should be vindicated through

the Fourth Amendment's warrant requirement. *See Troxel*, 530 U.S. at 87 (Stevens, J., dissenting) (noting that the "fundamental liberty interest in caring for and guiding [one's] children" connects to "a corresponding privacy interest").

Indeed, this Court frequently looks to other areas of law to determine whether a party's privacy expectations are reasonable enough to call for Fourth Amendment protection. In *Rakas v. Illinois*, for example, the Court grounded its decision in property law: noting that "[o]ne of the main rights attaching to property is the right to exclude others, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude," 439 U.S. 128 (1978) (citation omitted), the Court held that, because defendants had not asserted such a property right in a car that was searched, they had no reasonable expectation of privacy and the search did not violate the Fourth Amendment. *See id.* Existing law has been used to measure the reasonableness of a privacy expectation in other contexts, as well. *E.g., Florida v. Riley*, 488 U.S. 445 (1989) (White, J., concurring) (no reasonable privacy expectation in aerial footage of greenhouse when FAA regulations permitted low flights overhead).

* * *

The threshold for Fourth Amendment protection is, in other words, more than satisfied here. *Katz* requires only that society recognize a person's expectation of privacy as reasonable before the Fourth

Amendment is held to protect it. Here, society has long recognized as not just reasonable—but fundamental—parents and children's privacy and liberty interests in reserving to the family the control of family life and the upbringing of its children.

B. Children's And Parents' Expectation Of Privacy In Their Family Relationships And Child-Rearing Extends To Schools.

Contrary to Petitioners' arguments (*see* Camreta Brief dated December 10, 2010 ("Camreta Br.") at 30; Alford Brief dated December 10, 2010 ("Alford Br.") at 50), a family's privacy and liberty interests do not evaporate at the schoolhouse gate. The school search cases Petitioners cite are inapposite for several reasons.

1. First, the privacy interests at stake in the cases in which this Court approved warrantless school searches did not involve fundamental family relationships or the right to parental control of crucial child-rearing decisions. *T.L.O.* and later schoolhouse cases weighed the privacy interests that children suspected of wrongdoing had in their clothing, body, urine, or possessions when school officials conducted searches of such items. *See, e.g., New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (search of student's purse by school administrator); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (urine drug testing of student athletes); *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (urine drug testing of all students participating in any extracurricular activities); *Safford*, 557 U.S. ___, 129 S. Ct. 2633 (search of 13-year-old

female student that included shaking out bra and lifting elastic of underwear, conducted by school administrator and nurse under administrator's direction). In each case, the Court found that children have limited privacy interests because certain disciplinary aspects of custody and control are given over to schools when parents enroll their children. *See, e.g., T.L.O.*, 469 U.S. at 341; *Vernonia*, 515 U.S. at 654-55, 656 ("When parents place minor children in private schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them . . . the nature of [children's constitutional] rights is what is appropriate for children in school") (citations omitted). Certainly, the interests of the schoolchildren in those cases were important, and the intrusions were not trivial. But none of those searches involved outside officials invading the private family realm by questioning a child for hours about intimate sexual topics. Nor could any of the searches have led to the removal of children from their parents' custody.

Moreover, S.G.'s family did not lose their reasonable expectation of privacy in their family life and in areas of sexuality simply through S.G.'s presence at school. As *Katz* recognized, individuals carry their privacy interests with them: in Justice Stewart's words, "the Fourth Amendment protects people, not places." *Katz* at 351. And this Court has noted in other circumstances that liberty interests extend beyond spatial bounds. *See Lawrence v. Texas*, 539 U.S. 558, 562 (2003) ("there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom

extends beyond spatial bounds."). S.G.'s Fourth Amendment right is therefore one that she carries with her—whether at home, on the street or in school. *See also* Or. Rev. Stat. Ann. § 336.465.

2. Second, as Respondents discuss in their brief at 74, this case is different from the school search decisions Petitioners rely upon: parents explicitly or implicitly consented to their child's search in those cases. Here, the state never asked S.G.'s parents—even her mother, who was not alleged to have played any role in the suspected abuse of S.G.—to consent to the search. A parent cannot be said to consent to having her child interrogated by police and child welfare caseworkers about intimate sexual topics merely by sending her to school. Nor can S.G.'s parents be said to have expected that their child might be questioned by law enforcement officers concerning sexual abuse allegations. Although teachers are mandated reporters who can be expected to transmit reports of child abuse to the state, a teacher's duties do not give rise to an expectation that law enforcement officers or their agents will enter the school at will, with no report from the child, and then interrogate her about sexual abuse.

II. MAGISTRATES—NOT CHILD WELFARE CASEWORKERS—SHOULD BALANCE THE LEGAL RIGHTS AND POTENTIAL HARMS TO CHILDREN TO DECIDE WHEN TO CIRCUMVENT PARENTAL CONSENT.

Intrusions on a family's privacy and liberty interests are sometimes necessary, of course. The damage caused by child abuse is grievous and child

abuse is unquestionably a valid reason for state intervention. But even the most pressing social interests do not justify disregard of constitutional protections. As the Court noted in *Safford v. Redding*, both parents and public officials may tend to overreact to protect children from danger. "The difference is that the Fourth Amendment places limits on the official." 557 U.S. ___, 129 S. Ct. at 2643. In conducting interviews such as the one at issue here—interrogations lacking parental consent, judicial authorization, or exigent circumstances—the state risks replacing the potential harm of parental abuse of children with the certain harm of state interference in parental child-rearing.

To protect against such state intrusion into family life, the Fourth Amendment requires a warrant—or at least the approval of a neutral judicial officer—before questioning a child concerning sexual abuse, in the absence of parental consent. As detailed below, only neutral and independent magistrates can adequately balance the legal rights and potential harms to children when a caseworker seeks to circumvent parental consent to conduct an interview about intimate sexual details with a young child. Requiring judicial review in this context does nothing to hamper law enforcement, while ensuring that in each case, the risks to the child from potential abuse are balanced against both the risks from potential intervention and against that child's legal rights.

A. A Neutral, Detached, And Expert Arbiter Is Crucial When Weighing The Important Legal Rights And Potential Harms In Child Abuse Cases.

The Fourth Amendment compels review by a neutral and detached magistrate before searches such as the one here occur.[2] *See, e.g., Johnson v. United States*, 333 U.S. 10 (1948) (Fourth Amendment requires that a neutral and detached magistrate weigh whether there is sufficient probable cause to issue a

---

[2] This Court need not address whether probable cause must have supported the detention and interrogation here, or if a lesser standard is more appropriate. The Ninth Circuit's statement that probable cause is required was dictum, written in a footnote. *Greene v. Camreta*, 588 F.3d 1011, 1030 n.19 (9th Cir. 2009); *see, e.g., Wainwright v. Witt*, 469 U.S. 412, 422 (1985) (declining to decide issue raised in footnotes because such statements were dicta and noting that "[t]his Court has on other occasions similarly rejected language from a footnote as 'not controlling' "); *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76 (1990) ("[A]lthough we affirm the Seventh Circuit's judgment . . . we do not adopt the Seventh Circuit's reasoning"); *Smith v. Phillips*, 455 U.S. 209, 215, n.6 (1982); *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943); *Langnes v. Green*, 282 U.S. 531, 536-37 (1931); *Williams v. Norris*, 25 U.S. 117, 120 (1827) (Marshall, C.J.).

The relevant holding that this Court should affirm is the Ninth Circuit's determination that a neutral magistrate should be consulted before a nonconsensual, nonemergency search like the one that occurred in this case. There are occasions—and this may well be one—in which a showing of less-than-probable cause is appropriate for courts to authorize law-enforcement or social-services officials to conduct a search or seizure. *See, e.g., Kaupp v. Texas*, 538 U.S. 626 (2003); *Hayes v. Florida*, 470 U.S. 811 (1985); *Davis v. Mississippi*, 394 U.S. 721 (1969). That determination should be left to another day.

search warrant); *Katz v. United States*, 389 U.S. 347 (1967) (same). As this Court explained in *Groh v. Ramirez*, "[w]hen the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." 540 U.S. 551, 575 (2004) (quoting *Johnson*).

This core Fourth Amendment protection applies with equal force here. As detailed above, families have constitutionally protected privacy and liberty interests in controlling how their children discuss such an intimate topic as sex and sexual abuse. Those constitutional interests ground a reasonable expectation of privacy. The Fourth Amendment therefore requires a warrant—or at least the approval of a neutral judicial officer—before a child can be questioned about sexual abuse without his or her parent's consent.

The Ninth Circuit was therefore correct to reject the application of the "special needs" exception here. The essence of that exception is that certain fields are poorly suited to traditional requirements that depend on the use of neutral and detached magistrates. Neither child protection, nor police investigations involving allegations of child abuse, falls in those categories of investigations to which the Court has chosen not to apply the Fourth Amendment's warrant requirement. In rejecting the special needs exception, then, the Ninth Circuit did not blaze a new path; it followed settled law in several jurisdictions. *See, e.g.*, Alabama (Ala. Admin. Code r. 660-5-34-.02(1)(d);

Colorado (Colo. Rev. Statutes § 19-3-308(3)(b)); Indiana (Ind. Code § 31-33-8-7)); New Hampshire (N.H. Rev. Stat. Ann. § 169-C:34(VI)); West Virginia (Child Protective Services Policy 3.4 & 3.5 (Rev. July 10, 2008), available at http://www.wvdhhr.org/bcf/children_adult/cps/policy/CPSPolicy7_10_08_1.pdf).

B. Child Welfare Caseworkers Should Not Be The Arbiters Of Children's Constitutional Rights.

Child welfare caseworkers should not be asked to weigh the crucial and complex risks at stake when a child is suspected of being a victim of sexual abuse. In amici's extensive experience, these individuals sadly breach accepted best practices in such cases far more often than they implement them. Child welfare caseworkers—while undoubtedly deserving of credit for doing important work toward the protection of children—simply are not qualified to decide when, absent emergency, constitutional expectations of privacy are outweighed by other interests.

Although this Court recognizes that police officers gain a special expertise from their training and on-the-job experience, *see, e.g., United States v. Mendenhall*, 446 U.S. 544, 565-66 (1980) (noting "the considerable expertise that law enforcement officials have gained from their special training and experience"), the Fourth Amendment's general mandate requires judicial authorization for all nonemergency seizures which are more than limited street stops. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 29 (1968).

Whatever deference is shown to police officers in other, limited contexts, child welfare caseworkers—though they perform a difficult task—do not have the expertise of police officers. *See, e.g.*, Vivek Sankaran, *Wells Conference on Adoption Law: Judicial Oversight Over the Interstate Placement of Foster Children*, 38 Cap. U.L. Rev. 385, 391 (2009) ("the unfortunate reality is that child welfare procedures are often conducted by young, inexperienced workers who lack specialized training and carry high caseloads"). Researchers have noted the substantial challenges that face child welfare caseworkers and diminish their training and qualifications:

> a chronic shortage of caseworkers works against efforts to increase educational requirements. Fewer than 15% of child welfare agencies require caseworkers to hold either a bachelor's or master's degree in social work, despite evidence that caseworkers holding these degrees have higher job performance and lower turnover rates. Moreover, caseworker salaries are often low, and in some jurisdictions there is wide variation in salaries between public and private caseworkers. Thus, recruiting and retaining quality caseworkers is an ongoing challenge for most child welfare agencies.

Sandra Bass, *et al., Children, Families, and Foster Care: Analysis and Recommendations*, 14 The Future of Children 5, 24 (2004), available at http://futureofchildren.org/futureofchildren/publications/docs/14_01_01.pdf.

In Oregon, for example, child welfare caseworkers undergo only four weeks of training in the first three months of beginning their jobs.[3] Police officers in Oregon, by contrast, must graduate from a police academy after sixteen weeks of coursework and training. *See* Oregon Dep't of Public Safety Standards & Training, *DPSST Strategic Plan 2007-09 Biennium*, http://www.oregon.gov/DPSST/StrategicPlan200709.shtml. In Bend, Oregon, that sixteen-week training is supplemented by a four-week Bend Police Department Orientation Academy, a one-week "advanced academy" and a field training program lasting an additional seventeen weeks. *See* Bend Police Dep't, *Prof'l Career Opportunities*, available at http://www.ci.bend.or.us/depts/police/employment/patrol_officer.html. In sum, a new police officer in Bend undergoes thirty-eight weeks of training, nearly ten times the preparation that a new child welfare caseworker receives.

Moreover, turnover in the child welfare field is chronically high. *See* Child Welfare League of America, Child Welfare Workforce, *Research Roundup* (Sept.

---

[3] According to the Oregon Department of Human Services, child welfare staff must attend four weeks of training in their first several months of work. Oregon Dep't of Human Servs., Children, Adults & Families, *Mandatory Child Welfare Staff Training Program—Policy*, Policy No. III-E.5.1.1 (Effective Jan. 6, 2003), available at http://www.dhs.state.or.us/policy/childwelfare/manual_3/iii-e511.pdf; *see also* Ctr. for Improvement of Child & Fam. Servs. Portland State Univ., Sch. of Soc. Work, *DHS Training*, available at http://www.ccf.pdx.edu/cwp/pgCWP_dhs_training.php.

2002), available at http://www.cwla.org/programs/r2p/rrnews0209.pdf (child welfare agencies experience turnover that frequently exceeds 50% per year. Position vacancy rates often surpass 12%); Annie E. Casey Foundation, *The Unsolved Challenge of System Reform: The Condition of the Frontline Human Services Workforce* (2003), available at http://www.aecf.org/upload/publicationfiles/the%20unsolved%20challenge.pdf (child welfare workforce turns over at an annual rate of 20% for public agencies and 40% for private agencies).

Child welfare workers also lack the training and qualifications of social workers,[4] psychologists, or

---

[4] The amicus brief submitted by the National Association of Social Workers ("NASW") is puzzling in several respects. First, it consistently conflates child protective caseworkers with social workers, even though the vast majority of child protective caseworkers are not social workers. *See, e.g.*, Sandra Stukes Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*, 14 The Future of Children 75, 83 (2004), available at http://futureofchildren.org/futureofchildren/publications/docs/14_01_04.pdf. In fact, social workers have objected vociferously to mistaking the two, noting that child welfare caseworkers have substantially less training than social workers. *See* Kenneth J. Lau, *et al.*, *Mandated Reporting of Child Abuse and Neglect: A Guide for Social Workers* 18 (Springer Publ'g Co., New York 2009) (child protective caseworker positions, "when filled by persons other than those holding a degree in social work, are appropriately defined as 'casework' positions, *not* social work positions. Persons occupying these positions without a social work degree should be referred to as *caseworker*. Referring to such persons as *social workers* devalues the integrity of the social work profession."). And "where the practice of social work is regulated through a

(Continued on following page)

doctors. Child welfare workers rarely have any kind of advanced degree. Sandra Stukes Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*, 14 The Future of Children 75, 83 (2004), available at http://futureofchildren.org/futureofchildren/publications/docs/14_01_04.pdf ("only one-third of child welfare workers are trained social workers," 90% of state child welfare agencies

---

professional licensing system, holding oneself out as a 'social worker' without the proper credentials and licensing would be considered the illegal practice of social work without a license." *Id.* NASW's own website explains that social workers have "all earned bachelor's, master's or doctoral social work degrees, and have completed a required number of hours in supervised fieldwork." NASW, *Professional Standards*, available at http://www.helpstartshere.org/professional-standards. Child protective caseworkers simply do not have such standards. NASW itself issued a report finding as much. NASW, *If You're Right for the Job, It's the Best Job in the World*, at 4 (June 2004), available at http://www.naswdc.org/practice/children/NASWChildWelfareRpt062004.pdf (determining that social workers represent a small minority of child welfare caseworkers and discussing the "bleak picture" for the child welfare workforce, including "limited or inadequate supervision; and insufficient training").

Second, NASW argues that Bob Camreta—who by all accounts is not himself a social worker—is highly trained and experienced. Amicus Brief of the NASW, dated December 17, 2010 ("NASW Br.") at 28 n.4. Yet it provides no indication of what that training or expertise is. Third, by implicitly blaming mothers for the violence of fathers, as discussed in greater detail *infra* at 33-36, NASW embraces a view repudiated by social work researchers and educators. *See, e.g.*, Christina Risley-Curtiss and Kristin Heffernan, *Gender Biases in Child Welfare*, 18 Affilia 395 (2003) (condemning "mother blaming" and noting that social workers have "a critical role to play in moving the child welfare field toward a nonsexist approach to children and families").

report difficulty in recruiting and retaining workers, and documenting "Exceedingly high numbers of caseloads, poor working conditions, high turnover rates, and a poor public perception of the child welfare system. . . ."). Social workers, psychologists and doctors, by contrast, must undergo years of post-graduate education and satisfy a rigorous certification procedure.

Perhaps in part because of their limited education, training, and expertise, child welfare caseworkers are charged only with determining whether an interview of the child would benefit the investigation, not with considering whether there is a basis to overcome the child's right to have parents make these decisions. That role is rightly filled by a neutral magistrate.

C. Interrogations Of Children Concerning Alleged Sexual Abuse Are Extremely Intrusive And Can Be Permanently Damaging.

Interrogations such as the one to which S.G. was subjected damage children in ways that cannot be undone. *Greene v. Camreta*, 588 F.3d at 1011 (noting the "risk that 'in the name of saving children from the harm that their parents and guardians are thought to pose, states ultimately cause more harm to many more children than they ever help'") (quoting Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 Wm. & Mary L.

Rev. 413, 417 (2005)); *Franz v. Lytle*, 997 F.2d 784, 792-93 (10th Cir. 1993) ("we must be sensitive to the fact that society's interest in the protection of children is, indeed, multifaceted, composed not only with concerns about the safety and welfare of children from the community's point of view, but also with the child's psychological well-being, autonomy, and relationship to the family"). The interview may undermine family integrity and trust and suggest that it is not safe to trust parents. "Children . . . react even to temporary infringement of parental autonomy with anxiety, diminished trust, loosening of emotional ties, or an increasing tendency to be out of control." Joseph Goldstein, *et al.*, *Before the Best Interests of the Child* 25 (The Free Press, 1979). The interrogation may additionally encourage children to keep secrets from parents, who are sometimes never told of such interviews.

Indeed, even Petitioners themselves acknowledge the deep and lasting harms to which sexual abuse interrogations subject children. Alford Br. at 42 (quoting John E.B. Myers, *The Legal Response to Child Abuse: In the Best Interest of the Children?*, 24 J. Fam. L. 149, 182-84 (1985)); Camreta Br. at 28-29.

Abrogating a child's Fourth Amendment rights is no way to lessen the potential risks of child sex abuse investigations. On the contrary, as with medical care decisions, the constitutional presumption is that parents will make the best decisions for their children. Parents have the most information about the child's individualized needs (*e.g.*, in what environment the

child is most likely to be comfortable to be forthcoming, or whether the child has developmental needs that should be accommodated in an interview), and are usually the most motivated to have those needs drive decisions concerning their children. In some situations parents might also be aware of information that would explain the cause for concern without unnecessarily subjecting the child to interrogation. Child welfare caseworkers, by contrast, are under various pressures to meet the demands of their jobs. "[I]f officers of the State come to believe that they can never be questioned in a court of law for the manner in which they remove a child from her ordinary care, custody and management, it is inevitable that they will eventually inflict harm on the parents, the State, and the child." *Tenenbaum v. Williams*, 193 F.3d 581, 595 (2d Cir. 1999).

Moreover, the parent may be in a position to privately retain someone with far more expertise than the caseworker to conduct the interview. They may choose, for example, to observe the Guidelines for Clinical Evaluation for Child and Adolescent Sexual Abuse, issued by the American Academy of Child & Adolescent Psychiatry, and enlist a child sex abuse specialist with advanced degrees or specialized training to conduct the crucial first interview. *Cf.* Am. Acad. of Child & Adolesc. Psychiatry, *Guidelines for the Clinical Eval. for Child & Adolesc. Sexual Abuse* (modified Dec. 1990), available at http://www.aacap.org/cs/root/policy_statements/guidelines_for_the_clinical_evaluation_for_child_and_adolescent_sexual_abuse.

A parent may also conclude, as researchers have, that it would be more appropriate to conduct the first interview at a Child Advocacy Center, "safe, neutral, child-friendly facilities where children and families can receive a range of services. These include forensic interviews conducted by trained interviewers, medical examinations, mental health services, victim support and advocacy, case review by the multidisciplinary team, and tracking of case progress and outcomes."[5] Lindsey E. Cronch, *et al.*, *Forensic Interviewing in Child Sexual Abuse Cases: Current Techniques and Future Directions*, 11 Aggression & Violent Behavior 195 (2006); *see also* John E.B. Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases I*, at 47 (2005) ("As often as possible, children should be interviewed at specialized child advocacy centers, where interviewers are highly trained, interviews are videotaped, and interviewers

---

[5] Unlike the interrogation that occurred in this case, Child Advocacy Centers also videotape initial interviews in accordance with the "consensus . . . that videotaping is preferable" because it reduces the likelihood of traumatic additional interviews and because "recording is the best way to ensure accuracy." John E.B. Myers, *Myers on Evidence in Child, Domestic and Elder Abuse Cases I*, at 53-54 (2005) (and citing research that "interviewers tended to have incorrect recollections of how they questioned children"). Videotaped interviews of child sexual abuse victims have the substantial advantage of providing more reliable and persuasive evidence to courts later assessing whether abuse occurred. *Id.* at 55-56 (citing numerous courts regarding the increased reliability provided by videotaped sex abuse interviews of children).

receive regular feedback and supervision of their work").

Sarah Greene and her young daughter were not given the option of such a state-of-the-art, professional first assessment to determine whether abuse took place. Instead, a nine-year-old girl was closeted in a room with a caseworker and a police officer without her mother's knowledge. This deprivation was not incidental. "[B]ad interviewing can lead to serious consequences. These may include eliciting false allegations, putting children and families through unnecessary stress, decreasing a child victim's credibility in court, contaminating facts, reducing probability of conviction, draining resources through unsuccessful trials and investigations, and reducing resources available for legitimate abuse cases." Cronen, 11 Aggression & Violent Behavior 195, 196. And the first interview is crucial. If poorly done, the first interview about possible sexual abuse may so taint the child's response that the parent will never be able to determine whether the child was in fact sexually abused. *See id.* at 203 (noting that researchers have found "significantly more new details were obtained in the first interview than in subsequent interviews and interviewers were more likely to use specific suggestive utterances in later interviews"). Of course, both false positives and false negatives are likely to be extremely damaging to the child and to preclude appropriate treatment. *E.g.*, Steven Herman, *Improving Decision Making in Forensic Child Sexual Abuse Evaluations*, 29 Law & Human Behavior 87, 88

(2005) ("when a low quality investigation fails to substantiate genuine allegations of sexual abuse, vulnerable children may be left unprotected and perpetrators may go on to victimize other children in the future . . . a low quality investigation that results in an erroneous decision to substantiate abuse when no abuse has occurred or when the perpetrator has not been correctly identified can lead to the wrongful destruction of the lives of innocent children, adults, and families").

Choices about how best to handle suspected child sexual abuse are, in short, absolutely central child-rearing decisions that should be made by parents or, when necessary, by neutral magistrates.

It is notable just how often these kinds of searches are based on false tips or occur when no abuse has taken place. More than 3.7 million investigations of child abuse took place in 2008 alone. Of these, 772,000 claims were substantiated—approximately 20%. U.S. Dep't of Health & Human Servs., Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, *Child Maltreatment* (2008), at 23, available at http://www.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf. It is impossible to guess how many of the nearly three million unfounded investigations subjected children to damaging interrogations. Of course, reports of child abuse must be investigated. But surely when the process yields millions of baseless reports, it is vital to ensure meaningful oversight into the investigative process to prevent improper intrusions.

Otherwise, child "protective" services become a self-defeating endeavor, inflicting widespread harm on children and families in the name of their own best interests.

D. Requiring Judicial Review When Parents Are Not Consulted Would Not Hinder Investigations Of Child Abuse.

1. Judicial Review Would Rarely Be Necessary Because Parents Usually Consent To Interviews.

The great majority of parents consent to having their children interviewed by child welfare workers or police when abuse is suspected, with one scholar estimating that more than 90% give such consent. *See* Coleman, 47 Wm. & Mary L. Rev. at 417 ("over ninety percent of investigations are said to be based on consent"). When they do so, parents may make the interview less traumatic by reassuring the child before the interview, accompanying him or her at least to a waiting room, or advocating to have child psychologists or other professionals participate in the process.

That alone is reason for child welfare caseworkers to seek parental consent before interrogating children about sexual abuse allegations, and to seek judicial review to permit an interrogation only if consent is withheld. As the Court stated in *Camara v. Municipal Court of San Francisco*, when "most citizens allow inspections of their property without a warrant . . . as a practical matter and in light of the

Fourth Amendment's requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused. . . ." 387 U.S. 523, 539 (1967). Here, as in *Camara*, nonconsensual searches are usually unnecessary because of the ease with which the state can obtain consent. In those rare cases that parents refuse consent, child welfare caseworkers and police should turn to courts for approval.

2. *Non-Abusive Parents Like Sarah Greene Play A Crucial Role In The Investigative And Recovery Process.*

Petitioners ignore parents' crucial role in the interrogation process. Indeed, perhaps the most remarkable aspect of Petitioners' briefs to this Court is their thorough exclusion of Sarah Greene from their analysis. Petitioners argue that parental consent was impracticable and dangerous because S.G.'s father, Nimrod Greene, was himself suspected of the sexual abuse at issue. *See* Camreta Br. at 11 ("Seeking parental consent is simply not a safe or viable option when the suspected abuser is a parent"); Alford Br. at 41. No one is arguing that Nimrod Greene should have been consulted prior to the interview. But Petitioners fail to explain why S.G.'s mother—against whom no suspicion of abuse had ever been suggested—was not consulted. Beyond the constitutional presumption that Ms. Greene would make the best decisions for her daughter, there was additional reason to consult with her: part of the suspicion of sexual abuse rested on hearsay statements

that she was concerned about Nimrod Greene's behavior with their children. *See Greene v. Camreta*, 588 F.3d at 1016. Obtaining additional information from Ms. Greene concerning her alleged concerns before subjecting S.G. to an interrogation would have been advisable. Any concern that Camreta might then have had is exactly the sort of consideration that would have been better evaluated by a neutral arbitrator.

Amici in support of Petitioners go a step further, suggesting that mothers like Sarah Greene should not be consulted because they are, in effect, enablers of abuse. *See, e.g.*, NASW Br. at 15 ("non-abusive parents clearly have incentives such as family loyalty, denial, embarrassment, fear of retaliation, or loss of household income—to avoid an investigation"); Amicus Brief of the Arizona Prosecuting Attorneys Advisory Council dated July 2, 2010, at 22 (speculating that Sarah Greene knew of the abuse and claiming that "[T]he idea that parental consent can be obtained in this type of situation is nothing less than absurd").

Blaming mothers for the violence of fathers is a tired canard; social science research and courts have repeatedly put it to rest. *See, e.g., Nicholson v. Williams*, 203 F. Supp. 2d 153, 253 (E.D.N.Y. 2002) (discussing now-repudiated legal history of blaming women when they were raped; holding that battered mothers should not be blamed for violence against them and that when children are removed from battered mothers because of the domestic violence,

"[t]he evidence demonstrated that . . . [these practices] harm children much more than they protect against harm"); Nat'l Council of Juvenile & Family Court Judges Family Violence Dep't, *Effective Intervention in Domestic Violence & Child Maltreatment Cases: Guidelines for Policy & Practice* (1999) (recommendation by twenty-two states that "child protection services should avoid strategies that blame a non-abusive parent for the violence committed by others"). Ignoring Sarah Greene's ability to consent to the search in this case merely because of the suspected violence of her husband resurrects this outdated and unjust prejudice, an analysis that this Court should swiftly reject. *See, e.g.*, NASW Br. at 15 n.3 (Drawing parallel between non-abusive parents like Sarah Greene and "An abused mother [who] may thus avoid an investigation into the father's abuse of their child because she fears incurring the father's wrath herself, or because she wishes to hide or deny the fact that she too has been abused"). Both parents and children are harmed by such blame-shifting. *See* Olive Stevenson, *Foreword* to *Child Abuse & Child Abusers: Protection and Prevention, Research Highlights in Social Work* 24 (Lorraine Waterhouse ed., 1993) (imputation of blame to non-abusing parents causes rifts between parents and children, and between children and social workers).

In truth, it is a parent who is usually the advocate who cares most about investigating a claim that her child has been sexually abused, and the person who is most likely to report potential abuse.

See Jan Breckenridge and Eileen Baldry, *Workers Dealing with Mother Blame in Child Sexual Assault Cases*, 6 J. of Child Sexual Abuse 65, 69 (1997) (one study found that 75% of mothers were responsible for the official notification of incest after the child's disclosure) (*citing* E. Mulligan, Mothers of Sexually Abused Children: Their role in discovery and disclosure of child sexual abuse (Southern Women's Health and Community Centre South Australia 1986)); Betty Joyce Carter, *Who's to Blame?: Child Sexual Abuse and Non-Offending Mothers* (1999) (In a study of child sexual abuse cases, the majority of cases were reported to the state by the child's mother, and "[m]others responded supportively to their children's disclosures in spite of the stress when the offender was either a partner or someone closely connected with the family"). For good reason, then, "there is a presumption that fit parents act in the best interests of their children." *Troxel v. Granville*, 530 U.S. at 67; *see also Safford v. Redding*, 557 U.S. ___, 129 S. Ct. at 2643 ("Parents are known to overreact to protect their children from danger. . . .").

3. Many States Already Require Judicial Review Before Children Who Are Suspected Victims Of Sexual Abuse Are Seized Without Parental Consent Or Evidence Of Exigent Circumstances.

Neither Petitioners nor their amici point to any evidence that the many states already obliged to secure parental consent or judicial authorization before seizing a child thought to be the victim of

abuse have fared any worse in protecting children, nor have they suggested any reported problems associated with fidelity to the Fourth Amendment in this context. *See, e.g., Calabretta v. Floyd*, 189 F.3d 808, 813-14 (9th Cir. 1999) (requiring warrant before social worker may seize a child at home who is a suspected victim of abuse); *Tenenbaum v. Williams*, 193 F.3d 581 (2d Cir. 1999) (absent parental consent, judicial order or evidence of an emergency, child welfare caseworkers may not seize a child at school when they suspect abuse); *supra* at 20-21. To the contrary, as these states' experience has shown, children can be effectively protected while requiring child welfare caseworkers to obtain advance judicial approval of nonconsensual, nonemergency searches and seizures.

Given the significant privacy interests at stake when state officials seek to conduct interviews like S.G.'s, in the absence of an emergency, state officials must secure permission from a judge before conducting the interview. They may, if they choose, request parental permission or they may seek judicial authorization. But they may not, consistent with the plain meaning of the Fourth Amendment and the important values it represents, decide for themselves to undertake the momentous invasion of privacy that is involved in conducting the interview.

CONCLUSION

The privacy and liberty interests at stake in this case are significant. Our society has long recognized as fundamental a family's expectation that parents will determine how and when intimate sexual topics

are discussed with young children. Before intruding on such privacy interests, the Constitution requires that child welfare caseworkers and police either seek the consent of a parent who is not suspected of sexually abusing the child, or obtain the imprimatur of an independent and neutral magistrate. Absent parental consent, only a judge can weigh the complex and important legal interests at stake. Otherwise, child welfare caseworkers will be free to conduct an unlimited number of intrusive and damaging sexual interrogations of young children.

Sexual abuse of children is a tragic and devastating crime that must be stopped. But a state does not serve that laudable goal by ignoring the constitutional rights of children and families, or by inflicting lasting harm on young children through poorly executed or unnecessary interrogations. The Ninth Circuit recognized as much, and its decision below should, accordingly, be affirmed.

Respectfully submitted,

MARTIN GUGGENHEIM
CHRISTINE GOTTLIEB
NEW YORK UNIVERSITY
SCHOOL OF LAW
FAMILY DEFENSE CLINIC
245 Sullivan St.
New York, NY 10012
Telephone: (212) 998-6460
Email: guggenh@exchange.law.nyu.edu

CHARLES L. KERR
Counsel of Record
MARK DAVID MCPHERSON
ADAM JACKSON HEINTZ
HEIDI JOHANNS
MORRISON & FOERSTER LLP
1290 Avenue of the Americas
New York, NY 10104
Telephone: (212) 468-8000
Email: ckerr@mofo.com

Counsel for Amici Curiae

SUSAN JACOBS
CENTER FOR FAMILY
REPRESENTATION, INC.
116 John St.
19th Floor
New York, NY 10038
Telephone: (212) 691-0950
Email: sjacobs@cfrny.org

LAUREN SHAPIRO
BROOKLYN FAMILY
DEFENSE PROJECT
177 Livingston St.
7th Floor
Brooklyn, NY 11201
Telephone: (347) 592-2500
Email:
lshapiro@bfdp.ls-nyc.org

JANE M. SPINAK
COLUMBIA LAW SCHOOL
CHILD ADVOCACY CLINIC
Rm. 205, William Warren Hall
410 W. 116th St.
New York, NY 10027
Telephone: (212) 854-3857
Email:
spinak@law.columbia.edu

KARA FINCK
THE BRONX DEFENDERS
860 Courtlandt Ave.
Bronx, NY 10451
Telephone: (718) 838-7839
Email:
karaf@bronxdefenders.org

JANUARY 31, 2011

18

Nos. 09-1454, 09-1478

Supreme Court, U.S.
FILED
JAN 28 2011
OFFICE OF THE CLERK

In The Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

JAMES ALFORD,
Deschutes County Deputy Sheriff,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondent.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE PACIFIC JUSTICE INSTITUTE AND CPS WATCH LEGAL TEAM AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

DENNIS B. ATCHLEY*
DONNIE R. COX
LAW OFFICE OF DONNIE R. COX
402 N. Nevada Street
Oceanside, CA 92054
(760) 400-0263
dbalaw@yahoo.com
**Counsel of Record*

DAVID J. BEAUVAIS
409 13th Street, 20th Fl.
Oakland, CA 94612
(510) 832-3610
davebeau@pacbell.net

SHAWN A. MCMILLAN
4955 Via Lapiz
San Diego, CA 92122
(858) 646-0069
Attyshawn@netscape.net

PAUL W. LEEHEY
210 East Fig Street,
Ste. 101
Fallbrook, CA 92028
(760) 723-0711
Law@leehey.com

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
I. INTEREST OF *AMICI CURIAE*	1
II. DISCUSSION OF *CAMRETA V. GREENE*	2
III. SUMMARY OF ARGUMENT	2
ARGUMENT	4
IV. JUDICIAL REVIEW IS ESSENTIAL IN THE ABSENCE OF EMERGENCY OR PARENTAL CONSENT	4
V. CPS AGENTS ARE THE FUNCTIONAL EQUIVALENT OF POLICE OFFICERS AND SHOULD BE REQUIRED TO OBSERVE THE SAME CONSTITUTIONAL STANDARDS AS POLICE OFFICERS	10
VI. EXIGENCY IS AN ADEQUATE EXCEPTION TO WARRANT REQUIREMENTS	13
VII. NO REMEDY EXISTS IN THE JUVENILE COURTS FOR ABUSE OF CONSTITUTIONAL RIGHTS	16
VIII. THE VAST MAJORITY OF CPS AGENTS LACK THE EDUCATION AND TRAINING REQUIRED TO QUALIFY AS A "PROFESSIONAL"	18
IX. THE PERNICIOUS EFFECT OF SECRECY IN THE JUVENILE COURT SYSTEM	21
X. OTHER SYSTEMIC ISSUES ILLUSTRATE THE NEED FOR A CHECK ON THE POWER OF CPS AGENTS	27

TABLE OF CONTENTS – Continued

Page

XI. MONEY CREATES A PERVERSE INCENTIVE IN THE JUVENILE SYSTEM 29

XII. CONCLUSION 32

APPENDIX A

Certified copy of transcript of the deposition of Terri Ruffert, dated March 22, 2001, taken in Tulare County Superior Court Case, No. 00-0190263, *Bucholz v. Tulare County*, at pages 13, 21-22, 113-114, 160 ..... App. 1

APPENDIX B

Associated Press story dated August 2, 2003, regarding the Utah Attorney General's adapting to the new requirement that warrants be issued prior to the removal of children from their homes for suspected abuse ..... App. 4

APPENDIX C

Letter to the editor of the Syracuse Post-Standard dated October 13, 2008, from Mark Buttigliei, Central Division Director of the National Association of Social Workers' New York Chapter, regarding use of the term "social worker" in New York State ..... App. 5

APPENDIX D

Letter to the editor of the Philadelphia Inquirer dated November 16, 2006, from Jenna Mehnert, Executive Director of the Pennsylvania Chapter of the National Association of Social Workers, regarding licensing of social workers in Pennsylvania ..... App. 7

TABLE OF AUTHORITIES

Page

CASES

Calabretta v. Floyd, 189 F.3d 808 (9th Cir. 1999) 2

Camara v. Municipal Court, 387 U.S. 523 (1967) 16

Chandler v. Miller, 520 U.S. 305 (1997) 29

Chimel v. California, 395 U.S. 752 (1969) 28

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 13

Ferguson et al. v. City of Charleston, 532 U.S. 67 (2001) 29

Good v. Dauphin County Soc. Servs. For Children & Youth, 891 F.2d 1087 (3rd Cir. 1989) 3

Heartland Academy Church v. Waddle, 335 F.3d 684 (8th Cir. 2008) 2

Indianapolis v. Edmond, 531 U.S. 32 (2000) 29

Johnson v. United States, 333 U.S. 10 (1948) 29

In re Jonathan L., 165 Cal. App. 4th 1074 (2008) 1

Jonathan M. v. Superior Court, No. G043674, 8/27/10, 2010 WL 3367683 (Cal. App. 4 Dist.) 3, 31

Los Angeles County v. Humphries, Nov. 30, 2010 [2010 WL 4823681] 27

In re Mary S., 186 Cal. App. 3d 414 (1986) 17

May v. Anderson, 345 U.S. 528 (1953) 28

Meyer v. Nebraska, 262 U.S. 390 (1923) 28

TABLE OF AUTHORITIES – Continued

Page

Michigan v. Tyler, 436 U.S. 499 (1978) 13

Michael C. v. Gresbach, 526 F.3d 1008 (7th Cir. 2008) 3

Mincey v. Arizona, 437 U.S. 385 (1978) 28

New Jersey v. T.L.O., 469 U.S. 325 (1985) 12

People of the Territory of Guam v. McGravey, 14 F.3d 1344 (9th Cir. 1994) 7, 8

People United for Children, Inc. v. City of New York, 108 F. Supp. 2d 275 (S.D.N.Y. 2000) 17, 18

Prince v. Massachusetts, 321 U.S. 158 (1944) 28

Roska v. Peterson, 304 F.3d 982 (10th Cir. 2002) 3

Santosky v. Kramer, 455 U.S. 745 (1982).....23, 24

Skinner v. Oklahoma, 316 U.S. 535 (1942) 28

Skinner v. Railway Labor Executives' Ass'n, 4389 U.S. 602 (1989).....29

Tenenbaum v. Williams, 193 F.3d 581 (2d Cir. 1999).....3

Wallis v. Spencer, 202 F.3d 1126 (9th Cir. 2000).....8, 9

CONSTITUTION

U.S. Const. amend. IV .....*passim*

U.S. Const. amend. XIV 4

TABLE OF AUTHORITIES – Continued

Page

STATUTES

United States Code

20 U.S.C. §§ 1414(a),(b),(c) 14

42 U.S.C. § 1983 18

42 U.S.C. § 5106a(a)(2)(A) 11

42 U.S.C. § 5106a(b)(2)(A)(xi) 11

Child Abuse Prevention and Treatment Act (Pub. L. No. 93-247, § Stat. 4 (Jan. 31, 1974) (CAPTA) 11, 12

Title IV-E of the Social Security Act 30

Alabama Code

Section 26-14-7(c) 5

Section 26-16-13 11

Section 26-16-50 11

Alaska Statutes

Section 47.14.300(a) 11

Section 47.17.033(j) 11

Arizona Revised Statutes

Section 8-803(D) 5

Arkansas Code Annotated

Section 12-12-510(b) 5

TABLE OF AUTHORITIES – Continued

Page

California Penal Code
Section 11166(a), (j), (k) 11
California Welfare & Institutions Code
Sections 300-396 11
Section 340 5
Section 827 22
Colorado Code Regulations
Section 2509-3:7.202.51(A) 11
Colorado Revised Statutes
Section 19-3-308(3)(b) 5
Section 19-3-308(4) 11
Delaware – 16 Del. Code Ann.
Section 906(b)(15) 12
Section 910(b)(1) and (2) 5
Florida Statues Annotated
Section 39.301(13) 5
Hawaii Revised Statutes
Section 588-1(b)(5) 12
Idaho Admin. Code
16.06.01.570 12
Idaho Code Annotated
Section 16-1617 12

TABLE OF AUTHORITIES – Continued

Page

Illinois 325 Compiled Statutes Annotated
Section 5/7.1(a) 12
Section 5/7.3 12
Section 5/7.5 5
Iowa Code Annotated
Section 232.71B(6) 5
Kentucky Revised Statutes Annotated
Section 620.040(5) 5
Section 620.040(7) 12
Louisiana Child. Code
Section 613(A) 5
Maryland Code Annotated, Family Law
Section 5-712(b) 5
Massachusetts Regulation Code 110
Section 4.27.3 5
Michigan Statutes
Mich. R. Ct. 3.963(B)(1) 5
Minnesota Statutes
Section 626.556(10)(c) 5
Mississippi Code of Rules
11-111-001(2046) 5
Missouri Annotated Statutes
Section 210.145(10) 12

TABLE OF AUTHORITIES – Continued

Page

New Hampshire Revised Statutes Annotated
Section 169-C: 38 IV 5
New York Family Court Act
Section 1022 5
New York Social Services Law
Section 424 5
Section 423(6) 12
Section 424(5-a) 12
North Carolina General Statutes
Section 7B-303(a-b) 5
North Dakota Century Code
Section 50-25.1-05(2) 12
Ohio Revised Code Annotated
Section 2151.31 5
Oklahoma Statutes
Title 10 § 7106.C.2 5
Oregon Revised Statutes
Section 419A.255 22
Section 419B.007 11
Section 419B.020(2)(a) 12
Section 419B.150 5

TABLE OF AUTHORITIES – Continued

Page

South Carolina Code

Section 63-7-920(b) 5

Section 63-7-980 12

Tennessee Code Annotated

Section 37-1-607 12

Section 37-1-611(a)(3) 12

Utah Code Annotated

Section 62A-4a-202.3(8) 12

Section 78A-106 ..... 5, 13

Washington Revised Code

Section 26.44.180(2) 12

Wisconsin Statutes Annotated

Section 48.981(3)(a)(4) 12

Section 48.981(3)(c)(1)(b) 5

Wyoming Statutes Annotated

Section 14-3-405 5

RULES OF COURT

United States Supreme Court Rule 37.6 1

TABLE OF AUTHORITIES – Continued

Page

OTHER

American Bar Association Center on Children and the Law (2009), *Legal Representation for Parents in Child Welfare Proceedings: A Performance-Based Analysis of Michigan Practice*, at http://new.abanet.org/child/PublicDocuments/michigan_parent_representation_report.pdf 22

Anderson, Troy, *Government Bonuses Accelerate Adoptions*, Daily News of Los Angeles, December 8, 2003, at http//www.thefreelibrary.com/GOVERNMENT+BONUSES+ACCELERATE=ADOPTIONS 30

Author Unknown, *Mother Jailed, Put on Trial for Curing her Son of Melanoma*, Angry Scientist, October 3, 2007, at http://angryscientist.wordpress.com/2007/10/03/mother-jailed-put-on-trial-for-curing-her-son-of-melanoma 22

Author Unknown, *To Protect the Children*, Los Angeles Times, November 21, 2010, at http://articles.latimes.com/2010/nov/21/opinion/la-ed-dcfs-20101121 30

"Civil Liberties Without Exception," August 2008, at http://www.nccpr.org/reports/dueprocess.pdf 21

Coleman, Doriane L., *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 William and Mary Law Review, 413 (2005) 15

TABLE OF AUTHORITIES – Continued

Page

De Sa', Karen, (February 14, 2008), *A Call For Swift Change for Juvenile Dependency Courts,* MercuryNews.com, at http://www.mercurynews.com/dependency/ci_8258428?nclick_check=1.....3, 22

Dearen, Jason, (The Associated Press) (January 15, 2011), *California Custody Battle Sparks Overseas Outrage,* WashingtonPost.com., at http://www.washingtonpost.com/wp-dyn/content/article/2011/01/15/AR2011011501848.html.....10

Finkelhor, Jones, and Shattuck, *Updated Trends In Child Maltreatment 2009,* University of New Hampshire, at http://www.unh.edu/ccrc/pdf/Updated%20Trends%20in%20Child%20Maltreatment%202007.pdf 26

Glaberson, William, (December 4, 2004), *Family Nightmare: A False Report of Child Abuse,* at http://www.nytimes.com/1990/12/04/nyregion/family-nightmare-a-false-report-of-child-abuse.html 6

Lyons, Brendan J., *A 5-minute Error, 25 Years on Child Abuse List?* (May 23, 2010), Timesunion.com., at http://albarchive.merlinone.net/mweb/wmsql.wm.request?oneimage&imageid=10696111 26

National Public Radio, *Failure to Protect,* at http://www.pbs.org/wgbh/pages/frontline/shows/fostercare/inside/welfarefaq.html.....20

TABLE OF AUTHORITIES – Continued

Page

National Public Radio, *Failure to Protect,* interview with Martin Guggenheim, at http://www.pbs.org/wgbh/pages/frontline/shows/fostercare/inside/guggenheim.html 23

Opinion, *An Open and Shut Case*, Los Angeles Times, December 19, 2010, at http://articles.latimes.com/2010/dec/19/opinion/la-ed-dcfs-20101219 24

Police Association for College Education, Information Paper, March 18, 2004, at http://www.police-association.org/library/articles/information_paper.html 21

San Diego Police Dept. hiring requirements, at http://www.sandiego.gov/police/recruiting/join/index.shtml 21

Thompson, Lea, *Increasing Adoptions: A Good Idea Gone Wrong?* MSNBC, at http://www.msnbc.msn.com/id/13304867/ 31

Title IX, Section 9101, at http://ritter.tea.state.tx.us/nclb/hottopics/hqdef.html 21

U.S. Deptartment of Education, "A Summary of Highly Qualified Teacher Data," May 2008, at www2.ed.gov/programs/teacherqual/briefing-on-2006-07-hqt-data.doc 20

U.S. Department of Health & Human Services, *Child Maltreatment 2009,* at http://www.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf 25, 26

I. INTEREST OF *AMICI CURIAE*[1]

The *amici* here include The Pacific Justice Institute (PJI) and CPS Watch Legal Team (an outgrowth of CPS Watch, a national nonprofit organization that provides education, information and assistance to families involved with child welfare agencies). Established in 1997 in California, PJI is a nonprofit 501(c)(3) legal defense organization with several regional offices. PJI has helped defend the rights of hundreds of families from threats by county child protective service agencies. PJI routinely files briefs in cases involving defense of religious liberties and family rights. For example, PJI represented Sunland Christian School in *In re Jonathan L.*, 165 Cal. App. 4th 1074 (2008). In this landmark decision, the Court of Appeal reversed itself on rehearing, finding that home schooling is lawful in California. There, PJI participated in briefing and oral argument.

CPS Watch Legal Team consists of attorneys, paralegals, case managers, litigation support specialists, and advocates from various backgrounds, including civil rights, juvenile law, dependency, family law, and criminal law. The team assisted in all phases

[1] Pursuant to Supreme Court Rule 37.6, the parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

of the case in *Heartland Academy Church v. Waddle*, 335 F.3d 684 (8th Cir. 2008). The case arose from the unlawful removal of 115 of Heartland Academy's students by Lewis County (Missouri) officials in 2001. That removal led to the issuance of an injunction against Lewis County officials, which was upheld on appeal. The team has continued in their work, focusing on mass child removals and civil rights violations.

II. DISCUSSION OF *CAMRETA V. GREENE*

In *Greene*, the Ninth Circuit Court of Appeals considered whether a two-hour interview of a child by a caseworker and armed deputy sheriff on school grounds constituted an "unreasonable" seizure under the Fourth Amendment. At the time of the interview, no warrant, court order, or parental consent had been sought or obtained. The Court held the seizure of the child under these circumstances violated the Fourth Amendment.

III. SUMMARY OF ARGUMENT

Several Circuit Courts have found that Child Protective Services (CPS) Agents investigating child abuse are the functional equivalent of police officers conducting such investigations and should, therefore, be governed by the same Fourth Amendment standards. The Fourth Amendment preserves the "right of the people to be secure in their persons, houses . . . without limiting that right to one kind of government official," *Calabretta v. Floyd*, 189 F.3d 808, 813-814

(9th Cir. 1999). *Accord*: *Good v. Dauphin County Soc. Servs. For Children & Youth*, 891 F.2d 1087 1094-1095 (3rd Cir. 1989); *Roska v. Peterson*, 304 F.3d 982, 996 (10th Cir. 2002); *Tenenbaum v. Williams*, 193 F.3d 581, 604-605 (2d Cir. 1999); *Michael C. v. Gresbach*, 526 F.3d 1008, 1016 (7th Cir. 2008).

The juvenile dependency system in this country is dysfunctional. Even Justice Carlos Moreno of the California Supreme Court has noted that the system is in need of a major overhaul. See *A Call For Swift Change for Juvenile Dependency Courts*, by Karen De Sa' (February 14, 2008), MercuryNews.com, at http://www.mercurynews.com/dependency/ci_8258428?nclick_check=1.

The problem stems in part from CPS agents' lack of proper education, training, accountability, and oversight. Each of these problems is magnified by the secrecy endemic to juvenile court proceedings. The combination of these circumstances prevents the nation's public child welfare agencies from achieving their laudable goal – to protect children and, where possible, maintain the family.

CPS agents play a crucial role in protecting children, and with that role comes a duty to act in a responsible and ethical manner. An unwarranted intrusion upon a family may be as devastating to a child as any failure to act in a case of severe abuse. CPS agents have the power to protect children and families or destroy them. *Jonathan M. v. Superior Court*, 2010 WL 3367683 (Cal. App. 4 Dist.). Through

misuse of this power – whether intentional or negligent – social services agencies have become feared institutions in the minds of many Americans.

The Fourth and Fourteenth Amendments provide the only nationally enforceable check against the arbitrary exercise of the great power CPS agents wield. This compels adoption of a constitutional standard adequate to insure CPS agents and police officers carry out their mandate – to protect children and preserve families where possible – without denigrating the rights of those they are charged to protect.

In the absence of exigency, the laws of all states require the involvement of a neutral magistrate before children may be detained and removed from their parents' custody. Hence, there is no need to adopt the standard advocated by Petitioners when detaining children to interrogate them. Social service workers and police simply need to adhere to established constitutional principles of search and seizure. The Ninth Circuit's decision in this case properly balances the competing interests at stake. This Court should affirm that decision, if this Court reaches the merits.

ARGUMENT

IV. JUDICIAL REVIEW IS ESSENTIAL IN THE ABSENCE OF EMERGENCY OR PARENTAL CONSENT

Virtually all states have provisions whereby CPS agents and police officers investigating suspected

child abuse may obtain a court order to interview or detain a suspected child victim.[2]

Experience demonstrates that when CPS agents and police or sheriffs investigating alleged child abuse bypass judicial review, violations of the constitutional rights of children and parents often occur.

The Beck Family

In October 1988, CPS agents at Westchester County New York's Department of Social Services received an anonymous report claiming that three teenage girls were being beaten by their parents with

---

[2] Laws in each of the following twenty five states permit the agency investigating child abuse to seek a court order showing good cause before removing or interviewing a child: **Alabama** – Ala. Code § 26-14-7(c); **Arizona** – Ariz. Rev. Stat. § 8-803(D); **Arkansas** – Ark. Code Ann. § 12-12-510(b); **California** – Welfare & Institutions Code § 340; **Colorado** – Colo. Rev. Stat. § 19-3-308(3)(b); **Delaware** – 16 Del. Code Ann. § 910(b)(1) and (2); **Florida** – Fla. Stat. Ann. § 39.301(13); **Illinois** – 325 Ill. Comp. Stat. 5/7.5; **Iowa** – Iowa Code Ann. § 232.71B(6); **Kentucky** – Ky. Rev. Stat. Ann. § 620.040(5); **Louisiana** – La. Child. Code § 613(A); **Maryland** – Md. Code Ann., Fam. Law § 5-712(b); **Massachusetts** – Mass. Reg. Code 110 § 4.27.3; **Michigan** – Mich. R. Ct. 3.963(B)(1); **Minnesota** – Minn. Stat. § 626.556(10)(c); **Mississippi** – Code of Miss. Rules 11-111-001(2046); **New Hampshire** – N.H. Rev. Stat. Ann. § 169-C: 38 IV; **New York** – Soc. Serv. Law § 424; N.Y. Fam. Ct. Act § 1022; **North Carolina** – Gen. Stat. § 7B-303(a-b); **Ohio** – Ohio Rev. Code Ann. § 2151.31; **Oklahoma** – Okla. Stat. tit. 10 § 7106.C.2; **Oregon** – Or. Rev. Stat. § 419B.150; **South Carolina** – S.C. Code. Ann. § 63-7-920(b); **Utah** – Utah Code Ann. § 78A-106(1); **Wisconsin** – Wis. Stat. Ann. § 48.981(3)(c)(1)(b); **Wyoming** – Wyo. Stat. Ann. § 14-3-405.

belts and paddles at an address in Scarsdale. The caller claimed that the victims were three *girls*. The police determined the Becks did not have three girls. Despite these facts CPS agent Evelyn Hester went first to the home of Jennifer Beck, then sixteen, and her brother David, then thirteen. No one was home. The CPS agent then went to the children's school.

Without a warrant and without even notifying the children's parents, the CPS agent interrogated Jennifer and David and forced them to undress as she peered into their underpants while other people looked on. See William Glaberson, *Family Nightmare: A False Report of Child Abuse*, New York Times, December 4th, 1990, at http://www.nytimes.com/1990/12/04/nyregion/family-nightmare-a-false-report-of-child-abuse.html.

The Bucholz Family

Dawn Bucholz was five years old and developmentally delayed. In March 1999 her school principal called Tulare County (California) Child Protective Services. The principal reported that Dawn complained of pain in her vaginal area.[3] CPS agents Kristen Smith and Arlene Nunez, accompanied by a Tulare County sheriff, went to Dawn's school.

---

[3] All page and line references are to the deposition of Terri Rufert, taken on March 22, 2001 in *Bucholz v. County of Tulare et al.*, Tulare County Superior Court case No. 00-0190263, attached hereto as Appendix A. This material has been lodged with the clerk and provided to petitioner's counsel.

The principal told the sheriff and social workers that Dawn had difficulty describing things and expressing herself, and that she tended to get fixated. The principal wanted to call Dawn's parents, but the sheriff refused to let her. (21:22-22:9) The CPS agents ordered the school principal to restrain Dawn. One of the workers then inserted her ungloved finger into the resisting child's vagina to do what was termed an "examination." (113:12-114:20; 160:13-19)

It turned out that the swelling in Dawn's vaginal area was caused by the topical application of medicine.

The McMartin Family, Dale Akiki

In his dissent in *People of the Territory of Guam v. McGravey*, 14 F.3d 1344 (9th Cir. 1994), Justice Reinhardt cited the *McMartin* and *Akiki* cases as examples of the pernicious effect of leading and suggestive interviews of minor witnesses in cases of alleged child abuse:

> It is difficult to understand the majority's argument in light of recent well-publicized cases where sensational charges, later proved to be false, were made by children after they were interviewed by therapists who employed aggressive and leading questions. In the McMartin case . . . [the] owners of the McMartin pre-school in Manhattan Beach, CA, were charged with multiple counts of rape and sodomy, acts which the children alleged took place over many months and were accompanied by the slaughtering

> of animals and elaborate satanic rituals. . . . Despite wide and arguably prejudicial pre-trial publicity, both defendants were acquitted by a jury on 52 counts of child molestation. . . .
>
> In the Akiki case . . . another pre-school teacher, Dale Akiki, was acquitted by a jury on all counts but only after spending more than two years in jail awaiting trial. Allegations in this case, again made after interviews with a large number of children, included the ritual slaying inside the pre-school of a giraffe and an elephant. . . .

Id.

The Wallis Family

In 1991, San Diego County (California) CPS agents and City of Escondido Police Officers interviewed and detained a three-year-old boy and his five-year-old sister based on a report they received from a woman who had spent most of her adult life in mental institutions, and was going through repressed memory therapy. The woman told the agents that her brother-in-law, Bill Wallis, was going to sacrifice his son, Jesse, to the Devil. *Wallis v. Spencer*, 202 F.3d 1126 at 1131 (9th Cir. 2000). Without obtaining a court order and without any exigency whatsoever, the CPS agents and police officers removed both Lauren and Jesse from their parents. Then, without court order or medical need, agents performed a series of highly intrusive medical examinations, including internal vaginal and anal exams.

As the *Wallis* court noted "[a]t the time Lauren and Jessie were removed, the police department had received a report from a mental health worker that an institutionalized mental patient, who had an extensive history of severe delusional disorders and multiple personalities, had told a story of anticipated ritual murder by Jessie's father – a story that would appear to an objective observer clearly to be founded in mental illness. In fact, Detective Claytor later testified that the allegations "sounded a little bizarre" to him, and that he had expressed that opinion to Detective Pitcher at the time. Applying a reasonable cause standard, the juvenile court judge who subsequently heard the dependency petition in this case explicitly rejected those charges as a basis for removing Lauren and Jessie from their parents' custody." *Id.* at 1138-1139.

The N. Family

On January 15, 2011, the Washington Post carried a story concerning the removal of a nine-year-old boy and five-year-old girl from their parents after police seized photographs taken by the children themselves posing nude. Although the district attorney declined to prosecute the parents for this child play, CPS agents have nevertheless proceeded with a juvenile dependency case against them.

Months after the removal, the five year old made an ambiguous statement that her father had touched her without revealing sufficient detail to exclude the possibility that the touching was innocent. The

parents are Serbian nationals and the case has caused outrage in Serbia and pressure on the United States government to return the children immediately. A trial is scheduled in February, 2011. See Jason Dearen, *California Custody Battle Sparks Overseas Outrage*, (January 15, 2011) WashingtonPost.com, at http://www.washingtonpost.com/wp-dyn/content/article/2011/01/15/AR2011011501848.html.

In each of these cases, the investigating CPS agents or law enforcement personnel undertook the offensive conduct *without* requesting a warrant from a neutral magistrate. Moreover, and equally as important, there was no exigency shown in any of these cases.

These cases, like the case at bar, illustrate why review by a neutral magistrate is essential to protect children and their parents from the vagaries of warrantless interrogation of children and subsequent removal to foster care. Allowing CPS agents and policemen to interview children at school in the absence of exigency, parental consent, or a warrant as Petitioners urge, will undoubtedly lead to many more abuses of families such as those documented above.

V. CPS AGENTS ARE THE FUNCTIONAL EQUIVALENT OF POLICE OFFICERS AND SHOULD BE REQUIRED TO OBSERVE THE SAME CONSTITUTIONAL STANDARDS AS POLICE OFFICERS

In the dependency context, CPS agents are the functional equivalent of police officers, since both have

the power to investigate abuse and remove children from their homes. Or. Rev. Stat. § 419B.007, California Welfare & Institutions Code §§ 300-396.

The federal scheme of funding the states' child abuse prevention efforts mandates that CPS agents and policemen jointly investigate allegations of child abuse. With the passage of the Child Abuse Prevention and Treatment Act (Pub. L. No. 93-247, § Stat. 4 (Jan. 31, 1974) (CAPTA)), the federal government has acted to improve child abuse prevention efforts, and Congress codified this preference for multi-disciplinary teams in CAPTA by "creating and improving the use of multidisciplinary teams and inter-agency protocols to enhance investigations." 42 U.S.C. § 5106a(a)(2)(A). To be eligible for a grant under CAPTA, a state must submit a plan that includes an assurance that it has a child abuse program in place that requires "the cooperation of state law enforcement officials, courts of competent jurisdiction, and appropriate state agencies providing human services in the investigation, assessment, prosecution, and treatment of child abuse or neglect." 42 U.S.C. § 5106a(b)(2)(A)(xi). Perhaps in recognition of the lack of professional qualifications and training of CPS agents (see *infra* section VII), most states require multi-disciplinary investigations.[4]

---

[4] **Alabama** – Ala. Code §§ 26-16-13, -50; **Alaska** – Alaska Stat. §§ 47.14.300(a), .17.033(j); **California** – Cal. Penal Code § 11166(a), (j), (k); 12; **Colorado** – Colo. Code Regs. § 2509-3:7.202.51(A); Colo. Rev. Stat. § 19-3-308(4); **Delaware** – Del.

(Continued on following page)

This joining of forces, required by CAPTA, between CPS agents and police creates doctrinal confusion under the Fourth Amendment because of the mixed motives of the government officials participating in the investigation. This court made reference to this problem in another context in *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985), where it distinguished criminal investigations from those conducted to assure school safety and noted that reasonable suspicion was the appropriate standard in the latter instance.

But child interrogations during child abuse investigations do not implicate a governmental interest in assuring safety at school. Rather they touch on fundamental rights of parents and children to be free from governmental action which interferes with familial association. Since the interests are so different from those identified in *T.L.O.*, a different standard is called for. That standard should require submission of a warrant application to a neutral magistrate in the absence of parental consent or exigency.

Code Ann. tit. 16, § 906(b)(15); **Hawaii** – Haw. Rev. Stat. § 588-10(b)(5); **Idaho** – Idaho Code Ann. § 16-1617; Idaho Admin. Code 16.06.01.570; **Illinois** – Ill. Comp. Stat. Ann. 5/7.1(a), 5/7.3; **Kentucky** – Ky. Rev. Stat. Ann. § 620.040(7); **Missouri** – Mo. Ann. Stat. § 210.145(10); **New York** – N.Y. Soc. Serv. Law §§ 423(6), 424(5-a); **North Dakota** – N.D. Cent. Code §§ 50-25.1-05(2), -12; **Oregon** – Or. Rev. Stat. § 419B.020(2)(a); **South Carolina** – S.C. Code Ann. § 63-7-980; **Tennessee** – Tenn. Code Ann. §§ 37-1-607, -611(a)(3); **Utah** – Utah Code Ann. § 62A-4a-202.3(8); **Washington** – Wash. Rev. Code Ann. § 26.44.180(2); **Wisconsin** – Wis. Stat. Ann. § 48.981(3)(a)(4).

At present, such a requirement imposes only the slightest burden given the ready availability of magistrates in every jurisdiction at all times of day or night and the ability to obtain warrants by telephone or fax. For example, since the passage of Utah Stat. Ann. § 78A-6-106 in 2002, Mary Noonan, the chief of the Child Protection Division of the Attorney General noted that, "as attorneys have become accustomed to seeking removals, they have cut the average time needed [to obtain warrants] from five hours to about two." Associated Press State & Local wire, "DCFS, Meeting Legislative Mandates Harder than Expected," July 2, 2003. See Appendix B.

VI. EXIGENCY IS AN ADEQUATE EXCEPTION TO WARRANT REQUIREMENTS

This Court has long recognized that exigent circumstances will justify warrantless searches and seizures. Exigent circumstances have been defined as circumstances where "there is compelling need for official action and no time to secure a warrant." *Michigan v. Tyler*, 436 U.S. 499, 509 (1978). This Court has also held that "[T]he most basic constitutional rule" in the search and seizure area is that exceptions to the warrant requirement must be "specifically established," "well delineated," and "jealously and carefully drawn." *Coolidge v. New Hampshire*, 403 U.S. 443, 454-455 (1971).

Neither Petitioners nor their *amici* discuss this powerful law enforcement tool anywhere in their

briefs. Nor is there any argument that exigency supported the conduct of the officers and social workers in this case – it did not. Quite obviously, had a true emergency situation existed, enforcement agents would have had the right to interrogate and detain S.G.

For instance, had S.G. complained to her teacher, or other school official, that she was being abused; had she come to school with unexplained bruising or other injuries; or even if someone had called the authorities and stated that S.G. was about to be abused when she returned home; it would not only have been appropriate, but mandatory that she be questioned and, if justified, detained.

That is not what happened here. No complaint was ever made by S.G., her teachers, or any of the mandated reporters at her school. No doctor or other health care professional ever told the authorities that they suspected abuse. In fact, S.G. was a special education student who had an I.E.P.[5] and was more closely monitored as a result.

One could surmise the *only reason* these agents went to the school to interrogate this little girl was

[5] IEP stands for Individualized Educational Program, mandated by the Individuals With Disabilities Educational Act for children like S.G. 20 U.S.C. §§ 1414(a),(b),(c). It is designed to help teachers and school administrators understand a child's disability and how the disability affects the learning process. There is no evidence in the record that either Camreta or Alford inquired about or understood S.G.'s disability.

that they were trying to skirt the constitutional warrant requirement, a requirement they knew existed to protect families from intrusion into their homes. This has become a widespread practice among police and CPS agents. As one California official admitted, "usually kids are interviewed without the parent even knowing it. Very rarely does CPS actually go to the home, so we just don't need" [to worry about parental noncompliance and obtaining a warrant to search the family home]. Doriane L. Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 William and Mary Law Review, 413 at 438 (2005).

The circumstances of S.G.'s interrogation demonstrate why a warrant should be required. According to an evaluation done of S.G. at Elk Meadow School, her cognitive ability and her comprehension were below normal. School evaluators told her mother that she processed things very differently and was slow to respond or understand. J.A.[6] 42. Moreover, S.G. testified that during the interrogation by Camreta and Alford she "was scared, had a stomach ache and did not feel good." J.A. 54. Despite S.G.'s condition, Camreta kept at her for two hours, J.A. 55, refusing to accept her denials of having been abused. J.A. 71. Finally, S.G. testified that she did not know what Camreta was talking about when he inquired about "sexual abuse," J.A. 56. In the end, predictably, S.G.

[6] J.A. refers to the Joint Appendix.

simply and finally told her interrogators "what she thought they wanted to hear." J.A. 57.

On the facts of this case, there was no exigency to justify the conduct of these officers. Had there been, the CPS agent and the police officer would not have waited more than four days to intervene in the case after they knew S.G.'s father was back in the home. Nor would they have sent S.G. home to live with her – allegedly abusive – father for more than a week before she was removed.

VII. NO REMEDY EXISTS IN THE JUVENILE COURTS FOR ABUSE OF CONSTITUTIONAL RIGHTS

Juvenile court systems are designed to protect children from abuse or neglect rather than vindicate constitutional rights. Therefore, it is necessary that this court direct that judicial oversight, exigency, or parental consent operate as constraints against such abuses.

Parents and children whose rights have been violated by an improper in-school seizure have no remedy in the juvenile courts. Thus, strict adherence to Fourth Amendment warrant requirements is even more critical than in other instances. This Court has recognized that, except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant. *Camara v. Municipal Court*, 387 U.S. 523, 528-529 (1967).

For example, there is no suppression of evidence in a juvenile court no matter how egregious the Fourth Amendment violation may be. As the California Fourth District Court of Appeal noted in *In re Mary S.*, 186 Cal. App. 3d 414 (1986):

> Dependency proceedings are civil in nature, designed not to prosecute a parent, but to protect the child. [Citations.] A parent at a dependency hearing cannot assert the Fourth Amendment exclusionary rule, since 'the potential harm to children in allowing them to remain in an unhealthy environment outweighs any deterrent effect which would result from suppressing evidence' unlawfully seized. [Citations.]

186 Cal. App. 3d at 418-419, fn. omitted

The juvenile court itself does not review the manner by which evidence is obtained once the child is in the system. Particularly pertinent to this discussion is the case of *People United for Children, Inc. v. City of New York*, 108 F. Supp. 2d 275 (S.D.N.Y. 2000), where the plaintiffs challenged a system-wide policy of resolving any ambiguity in an abuse investigation in favor of finding that abuse had occurred. The court ruled that the issues raised in the parents' current challenge had not been actually and necessarily decided in prior proceedings. "Although the Family Court addressed the removal in plaintiffs' individual cases, it did not consider the broader claims asserted here, which relate to the system-wide policies and practices of ACS." *Id.* at 287.

The court also found that plaintiffs did not have a full and fair opportunity to litigate their current claims in the Family Court. "New York courts recognize that parents' rights are subordinate to the purpose of child protective proceedings, which is to protect the child from abuse or neglect" [citations omitted]. *Id.* The court also noted that in Family Court the parents are principally concerned with regaining custody of their children and have little incentive to raise or litigate constitutional claims especially where doing so may disrupt or prolong the proceedings. *Id.* at 287-288.

While a family may later seek to redress constitutional violations in an action under 42 U.S.C. § 1983 action, this is a far less efficient mechanism than preventing a violation by adhering to federal standards where they require a warrant in the first instance.

VIII. THE VAST MAJORITY OF CPS AGENTS LACK THE EDUCATION AND TRAINING REQUIRED TO QUALIFY AS A "PROFESSIONAL"

As stated earlier, CPS agents in general are not professionals. The word "professional" implies a certain level of expertise, education, and training that is

lacking in those who generally work for CPS.[7] Nor is training just a technical matter. It is designed to influence attitudes and to curb abuses of power. Effective training should engender sufficient "professionalism" to overcome even momentary impulses toward retribution or other unsavory actions.

Unfortunately, training provided to CPS workers leaves much to be desired. Their lack of sufficient education and training, both in their field generally and with regard to the constitutional rights of children and parents in particular, has a devastating impact on families who come into contact with CPS, as can be seen from the several cases described above.

In those cases and many others across the country, where parents have been wrongly accused of mistreatment of their children, this lack of professional training has led to children being illegally seized, physically and mentally injured, and families being traumatized and destroyed.

According to national data from the Child Welfare League of America, investigative caseworkers' qualifications fall into the following categories:

1. No degree: 5 percent
2. Bachelor's degree, any field: 26 percent

---

[7] Merriam Webster's Online Dictionary defines "professional" as "Characterized by or conforming to the technical or ethical standards of a profession."

3. Bachelor's degree, related field: 45 percent
4. Bachelor of Social Work: 14 percent
5. Master of Social Work: 2 percent
6. Other: 7 percent

In some states, caseworkers are required to have additional training, anywhere *from one day to several days' worth*! See National Public Radio investigative report, *Failure to Protect*, at http://www.pbs.org/wgbh/pages/frontline/shows/fostercare/inside/welfarefaq.html.

This means that 84% of caseworkers who work for CPS have no education, background, or training to work in a field that allows them to make momentous decisions about whether children should be removed from their parents' care, custody and control. According to executives of the National Association of Social Workers, in some states, these caseworkers are not allowed to refer to themselves as "social workers." See Appendix C. "Case and Social Worker Not the Same," Syracuse Post-Standard, Oct. 13, 2008 author Mark Buttiglieri; Appendix D. The Philadelphia Inquirer, Nov. 16, 2008, author Jenna Mehnert.

Contrast this with the education and training of public school teachers. Ninety seven percent (97%) of teachers nationwide are designated as "highly qualified." U.S. Dept. of Education, "A Summary of Highly Qualified Teacher Data," May 2008, at www2.ed.gov/programs/teacherqual/briefing-on-2006-07-hqt-data.doc. Generally, this means that teachers have a four-year college education, specialized training, and are certified in the subject that they are teaching. See

Title IX, Section 9101, at http://ritter.tea.state.tx.us/nclb/hottopics/hqdef.html.

Similarly, most police officers in major cities are now required to have a two-year or four-year college degree. Police Association for College Education, *Information Paper*, March 18, 2004, at http://www.police-association.org/library/articles/information_paper.html. Moreover, police training is comprehensive (up to twenty five weeks) and includes study of constitutional principles, including search and seizure law. In addition, officer candidates undergo psychological evaluations, both before hiring and during training. See San Diego Police Dept. hiring requirements, at http://www.sandiego.gov/police/recruiting/join/index.shtml.

By comparison to police officers, CPS agents are undereducated, undertrained, and poorly versed in constitutional principles. Moreover, they are charged with weighty responsibilities for which they are not adequately equipped.

IX. THE PERNICIOUS EFFECT OF SECRECY IN THE JUVENILE COURT SYSTEM

Thirty four states cloak their Juvenile Court proceedings in secrecy. "Civil Liberties Without Exception," August 2008, at http://www.nccpr.org/reports/dueprocess.pdf. Neither the press nor individuals other than parties are permitted to observe the proceedings. All documents related to the proceedings are confidential. Access to documents is strictly

controlled and almost never available to the public See Or. Rev. Stat. § 419A.255; California Welfare & Institutions Code § 827.

Parties are routinely prohibited from speaking to others about the proceedings. This includes the press. See *Mother Jailed, Put on Trial for Curing her Son of Melanoma*, Angry Scientist, October 3, 2007, at http://angryscientist.wordpress.com/2007/10/03/mother-jailed-put-on-trial-for-curing-her-son-of-melanoma. Rather than protecting the privacy of the parties, this secrecy is more often used to hide the misfeasance or malfeasance of child welfare agencies.

The juvenile court system not only operates in the dark but gives short shrift to the cases it handles. It is a system driven by the clock. There is little time for deliberation. Appointed lawyers pay scant attention to their clients, often meeting with them only on hearing days and just before critical decisions will be made in their cases. See http://www.mercurynews.com/dependency/ci_8258428?nclick_check=1. These flaws are not limited to those described by Justice Moreno and include the routine use of substitute counsel and failure to advocate by attorneys. See American Bar Association Center on Children and the Law (2009), *Legal Representation for Parents in Child Welfare Proceedings: A Performance-Based Analysis of Michigan Practice*, at http://new.abanet.org/child/PublicDocuments/michigan_parent_representation_report.pdf, at pages 4-7.

As Martin Guggenheim, Fiorello LaGuardia Professor of Clinical Law at New York University School of Law, observed:

> This is not a system of law that operates like most others, in which there is an understanding that an independent fact finder, the judge, is to play the prominent role in what happens. Instead, child welfare is seen mostly as case management, and the expert is not the judge but the case supervisor. So judges tend to give great deference to what is recommended. And in most jurisdictions, what the agency seeks, it gets.

National Public Radio, *Failure to Protect*, interview with Martin Guggenheim, at http://www.pbs.org/wgbh/pages/frontline/shows/fostercare/inside/guggenheim.html.

This Court has recognized the disparity between the parties at the termination of reunification stage of the proceedings:[8]

> The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given termination proceeding. The State's attorney usually will be expert on the issues contested and the procedures employed at the factfinding hearing, and enjoys

---

[8] At the time of *Santosky v. Kramer*, 455 U.S. 745 (1982), termination of parental rights was litigated in family courts. Today, they are litigated in juvenile courts.

> full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers, whom the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination.

Santosky at 763.

Respected juvenile court jurists believe the effect of secrecy in these courts is to protect the agencies themselves, rather than children. The Honorable Michael Nash, presiding judge of the Los Angeles County Juvenile Court – one of the largest in the nation – opined that "the main entity that's protected by closing these proceedings is the system itself." See Opinion, *An Open and Shut Case*, Los Angeles Times, December 19, 2010, at http://articles.latimes.com/2010/dec/19/opinion/la-ed-dcfs-20101219.

Nowhere is the negative impact of this opaque shield of secrecy more apparent than in the statistics presented by Petitioners and their *amici* when they suggest the scope of the child abuse problem is "staggering" (Alford Br. at 36) or an "epidemic." Camreta Br. at 24; Br. of National Ass'n of Social Workers and The Oregon Chapter of National Ass'n Of Social Workers at 4.

Petitioners, and virtually all of the *amici* briefs submitted in their support, stress the "huge" threat child abuse poses to society. They urge and attempt to justify the broad expansion of powers based on that perceived threat. Alford Br. at 28-29, 36; Camreta Br. at 11, 24. Statistics reveal, however, that the sky – in fact – is not falling. The "threat of abuse" trumpeted by Petitioners remains unrealized in the vast majority of cases.

Child Maltreatment 2009 presents national data about child abuse and neglect known to CPS agencies in the United States during federal fiscal year 2009. The data were collected and analyzed through the National Child Abuse and Neglect Data System (NCANDS), which is the twentieth of such reports. That data demonstrate that the rate of "substantiated" child abuse is the lowest it has been in nineteen years. See http://www.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf. For the 2004 data, see http://www.acf.hhs.gov/programs/cb/pubs/cm04).

In addition, a recent report analyzing the data presented in *Child Maltreatment 2009* reveals that the rate of sexual abuse per 10,000 persons under age 18 has *declined* 61% and the rate of physical abuse per 10,000 persons under age 18 has *decreased* 55%. The report also notes that the overall rate of substantiated child abuse "is the lowest level of child maltreatment since the NCANDS system was put in place in 1990."

Petitioners' suggestion that child abuse is a growing phenomenon is not supported by their own data. The statistics show substantiated instances of "child abuse" have decreased over the last 19 years, not increased. See Finkelhor, Jones, and Shattuck, *Updated Trends in Child Maltreatment 2009*, University of New Hampshire, at http://www.unh.edu/ccrc/pdf/Updated_Trends_in_Child_Maltreatment_2009.pdf.

Perhaps more importantly, the definition of what constitutes "abuse" is incomprehensibly vague and subjective. Those who argue for expansive government powers at the expense of familial rights skew their statistics by including instances of "neglect" under the penumbra of "abuse." "Neglect," constitutes 78.3% of all reported "abuse." See U.S. Department of Health & Human Services, *Child Maltreatment 2009*, at http://www.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf, Figure 3-4, page 23. This "neglect" – also loosely defined – can range anywhere from leaving a child unattended in a fenced playground for 5 minutes, to instances where the parents have gone on 2 day drinking binges. Lyons, Brendan J., *A 5-minute Error, 25 Years on Child Abuse List?* (May 23, 2010) Timesunion.com, at http://albarchive.merlinone.net/mweb/wmsql.wm.request?oneimage&imageid=10696111.

The data on which Petitioners rely are collected from databases maintained in each state to identify persons who are suspected of abuse or neglect. In cases where "sexual abuse" is "substantiated," as in others, the data are misleading. The obvious implication of a "substantiated" finding is that a court has adjudicated

the matter. Such an assumption would be incorrect. By statute, a "substantiated" finding is permitted based on conclusions reached by either a social worker, police officer, or other governmental agent without trial or any other judicial determination. Even when a Court has found there was no abuse, the government refuses to clear the accused of wrongdoing. *Los Angeles County v. Humphries*, Nov. 30, 2010 [2010 WL 4823681].

X. OTHER SYSTEMIC ISSUES ILLUSTRATE THE NEED FOR A CHECK ON THE POWER OF CPS AGENTS

Petitioners suggest that to protect children from potential abuse CPS agents and police must be armed with powers even broader than those under existing statutory frameworks. Camreta Br. at 11, 14; Alford Br. at 11, 36. The necessity for such broad powers is belied by the circumstances of this case, i.e. the utter lack of probable cause or exigency. Seizures and interrogations of children under circumstances that are themselves intimidating and traumatic are a form of abuse.

Petitioners espouse the notion that governmental power supersedes parental authority because *some* parents *may* refuse to allow their children to be interrogated based on *any* allegation of abuse or neglect. This "notion" is repugnant to American traditions. This Court has long held that there exists a "private

realm of family life which the state cannot enter." *Prince v. Massachusetts*, 312 U.S. 158, at 166 (1944).

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); "basic civil rights of man," *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); and "[r]ights far more precious . . . than property rights," *May v. Anderson*, 345 U.S. 528, 533 (1953).

The government's vital interest in preventing child abuse does not require sacrifice of Fourth Amendment protections. The argument which Petitioners make here has been made before and rejected by this Court. For example, in *Mincey v. Arizona*, 437 U.S. 385, 393 (1978), this Court rejected a proposed exception to the Fourth Amendment for warrantless searches at homicide scenes. The Court aptly noted that there would be no rational limitation to such a doctrine given any number of vital interests the government could assert to justify such an exception. In *Mincey*, *supra* at 393, quoting *Chimel v. California*, 395 U.S. 752, 766 (1969), the Court stated

> The State points to the vital public interest in the prompt investigation of the extremely serious crime of murder. No one can doubt the importance of this goal. But the public interest in the investigation of other serious crimes is comparable. If the warrantless search of a homicide scene is reasonable, why not the warrantless search of the scene of a

> rape, a robbery, or a burglary? "No consideration relevant to the Fourth Amendment suggests any point of rational limitation" of such a doctrine.

Child abuse – where it does occur – poses a serious threat. But, "the gravity of the threat alone cannot be dispositive of questions concerning what means law enforcement officers may employ to pursue a given purpose." *Indianapolis v. Edmond*, 531 U.S. 32 at 42-43 (2000). The Fourth Amendment's general prohibition against non-consensual warrantless searches, and searches where there is no probable cause necessarily applies to interrogations such as the one at issue here. See, e.g., *Chandler v. Miller*, 520 U.S. 305 at 308 (1997); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 at 619 (1989); *Ferguson et al. v. City of Charleston*, 532 U.S. 67 at 86 (2001). While it would serve the interests of expediency and efficiency to abrogate warrant requirements, it simply cannot be said that the rights of innocent families and children must give way to expediency. As this Court so eloquently stated, "When the right of privacy must reasonably yield to right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent." *Johnson v. United States*, 333 U.S. 10 at 14 (1948).

XI. MONEY CREATES A PERVERSE INCENTIVE IN THE JUVENILE SYSTEM

Due to enormous federal matching grants to support the foster care system, CPS agents are

encouraged to find abuse or neglect wherever they look. Since the funding is tied to the removal and adoption of children, little effort is made to keep children at home with services to the parents. The longer children remain out of home, the more money CPS agencies receive. This funding under Title IV-E of the Social Security Act has spawned a huge child abuse industry.

The budget of Los Angeles County's Department of Children and Family Services for 2009, alone, was $1.8 billion. That agency has a staff of more than 7,000. A decade ago 3,000 workers managed about 50,000 foster children. Since then, the number of CPS agents has *increased* to about 3,900, while the number of children in the system has *declined* to about 32,000. See Author Unknown, *To Protect the Children*, Los Angeles Times, November 21, 2010, at http://articles.latimes.com/2010/nov/21/opinion/la-ed-dcfs-20101121.

These tremendous financial incentives have perverted the goal of the juvenile court system – to protect children. "What you have now is an incentive to initially remove the child and an incentive to adopt them out," said David Sanders, former head of the Los Angeles County Department of Children and Family Services, one of the nation's largest child welfare systems. "I think when you put these two together, there is a problem." Troy Anderson, *Government Bonuses Accelerate Adoptions*, Daily News of Los Angeles, December 8, 2003, at http//www.thefreelibrary.com/GOVERNMENT+BONUSES+ACCELERATE=ADOPTIONS.-A0111075310.

Petitioners suggest that with dwindling budgets they need greater discretion to make efficient use of their more limited resources. Br. of Attorneys General at p. 11. But constitutional proscriptions against the exercise of government power should not be sacrificed in the interest of expediency or efficiency. As pressure mounts to justify the immensity of "child protection" budgets, the necessity of greater judicial oversight becomes paramount.

This need is illustrated by states such as Kentucky, where the State earns federal bonuses for keeping adoption numbers high, and where an NBC computer analysis showed that adoptions have tripled in six years, and the number of children returned to their homes has dropped sharply. See Lea Thompson, *Increasing Adoptions: A Good Idea Gone Wrong?*, MSNBC, at http://www.msnbc.msn.com/id/13304867/.

Nowhere is this pressure better illustrated than in the recent decision of the California Fourth District Court of Appeal in *Jonathan M. v. Superior Court*, *supra*. There, the Court issued a writ of mandate, finding that the juvenile court had abused its discretion when it reduced the petitioner father's visitation with his children simply because he had had sexual relations with the mother when she was 16 years old and he was less than two years older than she was. *Id.* at 7.

Noting that the allegation was groundless, the court stated:

> This kind of pleading undermines confidence in the system. It damages the reputation of

> the Social Services Agency and causes parents to suspect the system is prejudiced against them, and social workers will use any excuse they can think of -- whether credible or not – to deprive them of the custody of their children. *It has to stop*.

[Emphasis in original.]

XII. CONCLUSION

Petitioners call for a radical new "doctrine" which would vest broad quasi-judicial powers in CPS agents. This doctrine would give them *carte blanche* to intrude into family life on the flimsiest of pretexts. The Petitioners' and their *amici*'s claimed justification for these powers finds no support in law, and is antithetical to the American tradition of limited and accountable government.

In the juvenile dependency system – a system that operates largely under a shroud of secrecy – the neutral magistrate stands as a buffer designed by the architects of our constitutional system to prevent abuses. The importance of this buffer against arbitrary governmental intrusions cannot be overstated.

To remove this buffer, as Petitioners urge, would only serve to further undermine public confidence in a system already assailed as dysfunctional. It is the function of the neutral magistrate, not the CPS agent, to determine what constitutes probable cause as required by the Fourth Amendment. The well-reasoned and deliberate decision of the Ninth Circuit

should be affirmed in its entirety, if the Court reaches the merits.

Dated: January 28, 2011

Respectfully submitted,

DENNIS B. ATCHLEY*
DONNIE R. COX
LAW OFFICE OF DONNIE R. COX
402 N. Nevada Street
Oceanside, CA 92054
(760) 400-0263
dbalaw@yahoo.com
*Counsel of Record

DAVID J. BEAUVAIS
409 13th Street, 20th Fl.
Oakland, CA 94612
(510) 832-3610
davebeau@pacbell.net

SHAWN A. MCMILLAN
4955 Via Lapiz
San Diego, CA 92122
(858) 646-0069
Attyshawn@netscape.net

PAUL W. LEEHEY
210 East Fig Street,
Ste. 101
Fallbrook, CA 92028
(760) 723-0711
Law@leehey.com

Counsel for Amici Curiae

APPENDIX A

Bucholz v. Tulare County. Superior Court – California. Case No. 00-0190263

Deposition of Terri Ruffert, Dated March 22, 2001

Page 13:1-16

Q: And do you know what prompted their visit?

A: Yes. I'm the one that called CPS.

Q: Okay.

A: Dawn was complaining of pain in her lower area and the teacher brought her in – she was kind of difficult to understand – brought her in and I asked her questions based on what the teacher had said. The teacher said she kept pointing and saying it hurt and saying that daddy did it. So I questioned her. I tried to question her in a lot of different ways, and all she responded is she would point and respond that daddy did it, and so at that time with my responsibility, I had to call CPS, so I called them out at that time.

Page 21:22-26, Page 22:1-9

Q: Okay. When you talked to the officer when the social workers weren't present, what did that conversation consist of?

A: Basically I explained what happened like I've stated before and I also explained that I was a little uncomfortable with the referral because of the child's difficulty with receptive and expressive skills and the fact that she gets fixated on

something. And I believe I asked at the time – at that time if I could call the parents.

Q: And did he respond to that?

A: He told me no.

Page 113:12-26, Page 114:1-20

Q: Do you know if she touched her vaginal area with her hands?

A: I did not see her touch that.

Q: That's not the question.

A: I heard her talk to – I overheard a conversation with her and Arlene. And I didn't pick up the whole conversation, but my interpretation was that she did, but I didn't see it.

Q: Did what?

A: And I only heard part. Used her fingers.

Q: Used her fingers where?

A: To kind of spread to show Arlene.

Q: The labia?

A: Uh-huh. She didn't say that. She just –

Q: Tell me what she said. You can use the vernacular if you need to.

A: Okay. She was talking. It was when they were outside when I said they were outside the room kind of talking, and I really couldn't hear what they said, I just overheard a few things. And the only things I can remember, and I can't remember exactly, was – actually, it was after Kristen

made a phone call. And then I heard her say something about, "Did you see that? Did you see that when I pushed it to the side," and that's all I heard. I assumed that meant that she had her fingers somewhere or her hands or something.

Q: Somewhere where?

A: In the girl's private area or on her legs or something like that because of her comments that she's been violated.

Page 160:13-19

Q: Did Kristen go over and wash her hands before she examined the little girl?

A: No.

Q: Didn't use gloves?

A: No.

Q: And they were available?

A: Yes.

APPENDIX B

HEADLINE: DCFS: Meeting legislative mandates harder that expected

DATELINE: SALT LAKE CITY

BODY:

Meeting new mandates from the Legislature with a smaller staff has been tougher than expected, Division of Child and Family Services officials said.

One bill requires the division to seek a judge-signed warrant before removing a child from a home in non-emergency situations. The second requires the division to clean up its database of possible child abusers.

Both are providing more costly and time-consuming than anticipated. "It's adding up to a huge burden on this system," said Adam Trupp, legal administrator for the division.

Since July 1, when the mandates went into effect, the Utah Attorney General's Office has filed for 45 warrants to seize children.

"We're challenged to meet the demand," said Mary Noonan, the chief of the child protection division for the attorney general.

However, as attorneys have become accustomed to seeking warrants, they have cut the average time needed from five hours to about two, Noonan said.

APPENDIX C

Syracuse Post-Standard

Case and social worker not the same
Monday, October 13, 2008

To the Editor:

The circumstances surrounding Erin Maxwell's tragic death has created much controversy and leaves us perplexed. How could this happen again, another child in New York slipped through the system? The public is angry, looking to place blame.

The Sept. 28 editorial, "Protecting Our Children: Social services response to child neglect needs through review" utilizes the designation "social workers" interchangeably with "case workers." I would like to correct the misperception that "social workers" are professionals one and the same as "case workers," which is a generic unregulated term.

While the educational criteria for a case worker vary, and are often quite liberal; those for a social worker are much tighter, following strictly regulated curricula and requiring hundreds of hours of supervised practicum and rigorous academic standards.

Over 20 years ago, when I worked for Department of Social Services, a bachelor's degree was required to be a case worker; while I had earned my bachelors in human services before becoming a case worker, some of my Child Protective Services case worker colleagues held various degrees, including cooking, English, general studies, etc.

The interchangeable use of the term "social worker" with that of other professions often serves to denigrate and deprofessionalize a title of significant meaning; even more so when the profession is inadvertently and implicated in tragedies such as reported in your paper this week. The National Association of Social Workers recognizes that the title "social worker" may only refer to a person holding a bachelors, masters or Ph.D in social work.

Further, as a licensed profession in New York state, the practice of this profession is regulated by the New York State Education Department, limiting the provision of critical services such as mental health diagnosis and psychotherapy to degreed and duly licensed clinical social workers in this state.

It would be to the benefit of your readers and New Yorkers across the state to learn the true meaning of the term "social worker"; an often misunderstood profession.

Mark Buttiglieri is a licensed clinical social worker and Central Division director of the National Association of Social Work's New York chapter.

APPENDIX D

Date: Thursday, November 16, 2006

Source: The Philadelphia Inquirer

Author: Jenna Mehnert

There are many professions that perform critical functions in our society, but they aren't all treated equally. Doctors and nurses receive education specific to their life-saving roles, and then are licensed to practice their profession. The same can't be said of those who protect society's children. Why not? Look at the number of children who were murdered by caregivers or sexually assaulted. Aren't child-protection workers just as critical as doctors and nurses?

Ending violence against children is important not only because hurting the vulnerable is wrong, but also because the damage done comes back tenfold to society. Abuse costs millions of dollars and thousands of unfulfilled lives when damaged children drop out of high school, become teenage parents, enter the juvenile justice system, become addicts, or enter the adult corrections system. Abused children do all these things at statistically higher rates than children who are not abused.

Given how critical protecting children is, one would assume that child-protection workers are educated, trained and licensed to ensure they adequately perform this critical role. Not in Pennsylvania. The Child Protective Services Law does not even require that a child-protection worker have a college degree, let

alone a degree in social work, the professional field developed to educate people to protect children. You would not want a doctor without a medical degree operating on your child, yet Pennsylvania allows individuals without the proper education to protect children.

If they don't have a degree, do they have to at least be well trained? No. In Pennsylvania, a new child-protection worker has up to two years to be trained. You would not want a doctor who had not completed a residency to make your medical decisions alone, yet poorly trained, inexperienced child-protection workers are making life-and-death decisions every day in this state.

Is a state licensing board watching over these workers? No. Child-protection workers are not required to be a member of any licensed profession, so there is no one to ensure that they are doing an adequate, ethical job.

The bottom line is that child protection is not regarded as a profession in Pennsylvania. Individuals who risk their lives and are responsible for the lives of others aren't viewed as professionals, and are not compensated adequately for the incredibly challenging work they do. Philadelphia's Department of Human Services has garnered public attention for its problems lately, but it's not alone in failing to protect children. Across the state, child-protection workers are grossly underpaid, ridiculously overworked through high caseloads, and largely

paraprofessional. Do we really want nonprofessionals removing children from homes and breaking apart families because they lack the professional training to determine when a family can be safety [sic] kept together?

The bottom line is that children and their families will suffer until the state requires that child-welfare workers be professional social workers, sets minimum standards for training, develops a professional pay scale, and limits caseloads.

Jenna Mehnert is executive director of the Pennsylvania chapter on the National Association of Social Workers.

Nos. 09-1478 and 09-1454

In The Supreme Court of the United States

JAMES ALFORD,
DESCHUTES COUNTY DEPUTY SHERIFF,
Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor and K.G., a minor,
Respondent.

BOB CAMRETA,
Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor and K.G., a minor,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE RUTHERFORD INSTITUTE, AMICUS CURIAE, IN SUPPORT OF RESPONDENT

John W. Whitehead
Counsel of Record
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, Virginia 22906
(434) 978-3888

Counsel for Amicus Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

QUESTION PRESENTED

Whether a police officer and a child protective services investigator violated the Fourth Amendment when they conducted a two-hour-long custodial interrogation of a 9-year-old girl at her school building, to determine if she was the victim of paternal child abuse, without a warrant or court order, without exigent circumstances, and without the consent of the mother?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 2

I. THE SEIZURE OF S.G. WAS THE EQUIVALENT OF AN ARREST AND ILLEGAL UNDER ESTABLISHED FOURTH AMENDMENT STANDARDS 2

II. CHILDREN IN PUBLIC SCHOOLS ARE NOT IN THE CUSTODY OF THE GOVERNMENT TO SUCH AN EXTENT THAT SEIZURES OF THE KIND AT ISSUE IN THIS CASE CAN BE DEEMED CONSTITUTIONALLY INSIGNIFICANT .. 11

A. Children in Public Schools Retain a Liberty Interest to be Free From Seizures Unrelated to Discipline or Another School Interest 13

B. Government Restraint on Public School Students' Liberty Is a Dangerous Trend and Should Not Be Extended by Recognizing That the Seizure of S.G. Was Legal 17

CONCLUSION 21

TABLE OF AUTHORITIES

Cases

Bd. of Educ. Of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, (2002) 14, 15

Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) 14

Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523 (1967) 11

Doe ex rel. Doe v. Little Rock Sch. Dist., 380 F.3d 349 (8th Cir. 2004) 18

Doe v. Heck, 327 F.3d 492 (7th Cir. 2003) 6

Dunaway v. New York, 442 U.S. 200 (1979) ... 4, 5, 10

Florida v. Royer, 460 U.S. 491 (1983) 4, 7

Greene v. Camreta, 588 F.3d 1011 (9th Cir. 2009) 5

Illinois v. Lidster, 540 U.S. 419 (2004) ..... passim

Indianapolis v. Edmond, 531 U.S. 32 (2000) 8

Ingraham v. Wright, 430 U.S. 651 (1977) 15, 16

Katz v. United States, 389 U.S. 347 (1967) 3

Morse v. Frederick, 551 U.S. 393 (2007) 16

New Jersey v. T.L.O., 469 U.S. 329 (1985) 12, 13, 15, 21

Olmstead v. U.S., 277 U.S. 438 (1928) 21

Pierce v. Society of Sisters, 268 U.S. 510 (1925)..... 12

Rhoades v. Penn-Harris-Madison Sch. Corp., 574 F. Supp. 2d 888 (N.D. Ind. 2008)..... 19

Terry v. Ohio, 392 U.S. 1 (1968)..... 3, 4, 15

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969)..... 13, 20

United States v. Brignoni-Ponce, 422 U.S. 873 (1975) 10

United States v. Mendenhall, 446 U.S. 544, (1980).. 6

United States v. Place, 660 F.2d 44, (2d Cir. 1981), *affirmed*, 462 U.S. 696 (1983)..... 3, 7

Vernonia School Dist. 47J v. Acton, 515 U.S. 646 (1995)..... 13, 14, 15, 16

West Virginia St. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)..... 21

Wisconsin v. Yoder, 406 U.S. 205 (1972)..... 12

Other Authorities

Comment, *Student Drug Testing: The Blinding Appeal of In Loco Parentis and the Importance of State Protection of Student Privacy*, 2008 B.YU. Educ. & L.J. 251 (2008)..... 20

Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused and in Need of Change*, 78 U. Cin L. Rev. 969, 971 (2010)..... 17, 20

Va. Atty. Gen. Op. 10-105, 2010 WL 4909931 (Nov. 24 , 2010)..... 19

Constitutional Provisions

U.S. Const. Amend. IV ..... passim

INTEREST OF *AMICUS CURIAE*[1]

Since its founding over 29 years ago, The Rutherford Institute has emerged as one of the nation's leading advocates of civil liberties and human rights, litigating in the courts and educating the public on a wide variety of issues affecting individual freedom in the United States and around the world.

The Institute's mission is twofold: to provide legal services in the defense of civil liberties and to educate the public on important issues affecting their constitutional freedoms. Whether our attorneys are protecting the rights of parents whose children are strip-searched at school, standing up for a teacher fired for speaking about religion or defending the rights of individuals against illegal searches and seizures, The Rutherford Institute offers assistance—and hope—to thousands.

The case now before the Court concerns the Institute for two reasons. First, the Institute is concerned about the increasing erosion of the rights of children and parents in the context of public schools. Second, the Petitioners' arguments are wholly at odds with long-established Fourth Amendment principles governing the legality of

---

[1] Counsel of record to the parties in this case have consented to the filing of *amicus* briefs in support of either party or neither party. No counsel to any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* and its counsel have contributed monetarily to its preparation or submission.

seizures of the person that are the equivalent of an arrest.

SUMMARY OF THE ARGUMENT

Despite this Court's long-standing recognition that students do not shed their constitutional rights at the schoolhouse gates, our schools are increasingly being transformed into police states where children are subject to indignities, such as mass, suspicionless searches, and parental rights to the primary care, custody, and control of their children are ignored. The Petitioners request that this Court give its support to a further degradation of the rights of public school children and their parents even though the focus of the suspected criminal conduct has no nexus to the school whatsoever, save that the child at issue attends a public school. Acceptance of the Petitioners' request that a generalized exception to the Fourth Amendment rights of students and parents be recognized in this case would send a message that individual rights are forfeited when parents send their children to public schools.

ARGUMENT

I. THE SEIZURE OF S.G. WAS THE EQUIVALENT OF AN ARREST AND ILLEGAL UNDER ESTABLISHED FOURTH AMENDMENT STANDARDS

The Petitioners and their supporting *amici* invoke the "reasonableness" test of the Fourth Amendment but divorce it from bedrock principles

that have informed this fundamental protection of individual privacy. Although it is nowhere disputed by the Petitioners that the actions of the Petitioners in interrogating S.G. constituted a seizure of the person, they fail to acknowledge the venerable principle that such seizures, if executed without probable cause or judicial authorization, are presumptively constitutionally unreasonable. With rare exceptions, the seizure of a person is deemed per se unreasonable unless a warrant is obtained from a neutral magistrate upon a showing of probable cause. *United States v. Place*, 660 F.2d 44, 47 (2d Cir. 1981), *affirmed*, 462 U.S. 696 (1983) (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)).

Even with respect to brief seizures based upon reasonable suspicion and in the interest of officer safety condoned in *Terry v. Ohio*, 392 U.S. 1 (1968), the exception is narrow:

> *Terry* and its progeny nevertheless created only limited exceptions to the general rule that seizures of the person require probable cause to arrest. Detentions may be "investigative" yet violative of the Fourth Amendment absent probable cause. In the name of investigating a person who is no more than suspected of criminal activity, the police may not carry out a full search of the person or of his automobile or other effects. Nor may the police seek to verify their suspicions by means that approach the conditions of arrest.

Florida v. Royer, 460 U.S. 491, 499 (1983). In *Dunaway v. New York*, 442 U.S. 200 (1979), a state also attempted to justify the warrantless seizure of a person for the purposes of questioning on the basis that the police believed he had intimate knowledge about a serious unsolved crime. This Court refused to uphold the seizure, stressing that the one-hour questioning did not amount to the kind of brief seizure at issue in *Terry* and warning that "any 'exception' that could cover a seizure as intrusive as that in this case would threaten to swallow the general rule that Fourth Amendment seizures are 'reasonable' only if based on probable cause." *Id.* at 213.

The *Dunaway* decision also rejected adoption of precisely the kind of "reasonableness" approach urged by the Petitioners in this case:

> In effect, respondent urges us to adopt a multifactor balancing test of "reasonable police conduct under the circumstances" to cover all seizures that do not amount to technical arrests. But the protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the "often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333

> U.S. 10, 14, (1948). A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront. Indeed, our recognition of these dangers, and our consequent reluctance to depart from the proved protections afforded by the general rule, are reflected in the narrow limitations emphasized in the cases employing the balancing test. For all but those narrowly defined intrusions, the requisite "balancing" has been performed in centuries of precedent and is embodied in the principle that seizures are "reasonable" only if supported by probable cause.

Dunaway, 442 U.S. at 213-214.

S.G.'s detention in this case was similar to that considered in *Dunaway* and must be considered the kind of significant seizure to which the established principles of the Fourth Amendment apply.[2] S.G. was taken from her classroom by a

---

[2] *Amici* California State Association of Counties and League of California Cities argue that this Court should rule at the threshold that there was no seizure of S.G. (Brief of California State Assoc. of Counties, and League of California Cities at 7-22). However, the Ninth Circuit noted that the Petitioners did not contest that the questioning of S.G. constituted a seizure of her person, *Greene v. Camreta*, 588 F.3d 1011, 1022 (9th Cir. 2009),

school counselor and placed in an office with two strangers who began to interrogate her. Nothing in the record indicates that S.G. was asked by the counselor whether she wanted to go see these men; all indications are that S.G.'s presence in the room was mandated by the counselor. The Petitioners do not cite to anything in the record indicating that they told S.G. she could stop the encounter at any time and return to her school activities. S.G. clearly was not free to leave, and it is even clearer that a reasonable nine-year-old would not have felt free to leave. Under this Court's guiding principles, S.G. was seized for purposes of the Fourth Amendment. *See Doe v. Heck*, 327 F.3d 492, 510 (7th Cir. 2003) (student was seized when taken by social services caseworker and law enforcement officer into a room for questioning in a sexual abuse investigation because a reasonable student would not have felt free to leave, citing *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)).

Contrary to the suggestions of the Petitioners and some of their supporting *amici*, the treatment of S.G. was not the equivalent of "mere questioning" by state officials which does not trigger traditional Fourth Amendment scrutiny of seizures of the person. Both Petitioners argue that *Illinois v. Lidster*, 540 U.S. 419 (2004), should control here because S.G. was questioned as a witness, not a suspect. But *Lidster* does not justify any and all seizures of the person not aimed at building a criminal case against that person. Instead, this Court emphasized that its decision applied to "*brief*,

---

effectively conceding that the Fourth Amendment is implicated by the conduct of the state officials.

information-seeking *highway stops* of the kind now before us." *Lidster* was grounded in large part upon the more limited expectation of privacy of motorists on the highway. *See id.*, 540 U.S. at 424 ("The Fourth Amendment does not treat a motorist's car as his castle."). By distinction, this case involves an individual's right to bodily autonomy and to be free of detention pursuant to a claim of authority by the government. Unlike the situation of a person in a vehicle, this right finds no similar limitation in this Court's Fourth Amendment precedent. *See Royer*, 460 U.S. at 501-02 (when officials make a show of authority such that a reasonable person would not believe he was free to leave and must accompany the officials to another location, a person is effectively seized in a manner equivalent to an arrest).

More significantly, *Lidster* involved a "brief" seizure of motorists. The facts there indicated that a car would be stopped for between 10 and 15 seconds. *Lidster*, 540 U.S. at 422. Clearly, the brevity of a seizure is an important factor in determining the Fourth Amendment interests at stake. *Place*, 462 U.S. at 709. The seizure of S.G. was anything but brief; she was kept in the room with the Petitioners for *two hours*, far longer than the kind of investigative detention evaluated under the "reasonableness" test set forth in *Lidster*, 540 U.S. at 427.

Indeed, it is the brevity inherent in the kind of information-seeking vehicle stops at issue in *Lidster* that was the basis for the Court's use of a generalized "reasonableness" test as opposed to the

presumptive rule of unconstitutionality. The *Lidster* decision stressed at several points that the kind of seizures considered there "are likely brief." 540 U.S. at 425. It refused to employ the analysis used in *Indianapolis v. Edmond*, 531 U.S. 32 (2000), because the information-gathering "motorist stop will likely be brief. Any accompanying traffic delay should prove no more onerous than many that typically accompany normal traffic questioning." *Lidster*, 540 U.S. at 426.

Contrary to the Petitioners' contentions, *Lidster* does not stand for the proposition that any seizure in which government officials seek to obtain information about possible criminal activity from a non-suspect is subject to the "reasonableness" balancing test employed in that case. Such balancing was employed there because the kind of seizure at issue was by its nature likely to be brief. Where police stop motorists in order to determine whether they have information about an incident, there is little reason to believe that the seizure will be onerous because police will quickly determine whether the motorist has some information. To the extent the motorist does have information to impart, any extension to the stop for additional questioning will be wholly with the consent of the motorist. *Id.* Thus, *Lidster* does not make all information-gathering seizures subject to the reasonableness balancing test, but only those which are inherently brief and are additionally less invasive of privacy due to a lessened expectation of privacy.

Seizures of the kind at issue here are not inherently brief and this Court should not extend

the analysis of *Lidster* to in-school custodial questioning of students as part of abuse investigations. Unlike questioning of an adult motorist about his or her knowledge of an incident, questioning of minors about their family life will almost certainly be drawn out and require an extended period of detention by state officials. Children are understandably reluctant to speak about their home life with strangers and even more so when the discussion turns to matters of a sexual nature. From an early age children are warned to be protective when it comes to their "private parts" or adults (strangers or otherwise) who start to pry into those inherently private areas. Given this reluctance, investigators such as the Petitioners are likely to press a child for an extended period of time in order to determine whether an initial negative response to questions about whether the child has been abused are really "true." Additionally, communication problems may be an issue, especially for younger children, which will require investigators to prolong the detention and questioning even further. Clearly, the context presented by this case is not one where the seizure could be expected to be brief. Indeed, in this case the Petitioners felt it necessary to hold S.G. for two hours. The *Lidster* rule should not be extended to the kind of child questioning at issue here because it is unlikely that the seizure government officials will deem required will be brief.

In its *amicus* brief, the United States argues that the generalized reasonableness test should be applied when students are seized for abuse investigations because they are unlike traditional

arrests. Yet, apart from the fact that S.G.'s seizure occurred at school (as discussed, *infra*), her detention was certainly closer to an arrest and more restrictive and invasive than the kind of seizures of the person deemed subject to a lesser Fourth Amendment standard. As pointed out above, the seizure of S.G. specifically and similar seizures generally are not the kind of brief, on-the-street stops considered in *Lidster*, nor are they like the roving vehicles stops for immigration enforcement considered in *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975), which involved detention for less than a minute and posing of a question or two.

Indeed, the seizure of S.G. more closely resembles the seizure considered in *Dunaway*, which the United States admits was the functional equivalent of an arrest. As in that case, S.G. was taken by authority figures to an isolated spot where she was questioned for an extended period of time. She was not questioned where she was found. *Dunaway*, 442 U.S. at 212. S.G. was never informed that she had the option of terminating the interview and it is beyond question that if she had attempted to terminate the interview and return to her class, she would have been physically restrained. *Id.* This seizure plainly was not like the momentary stops this Court has found to be subject to the kind of reasonableness analysis the Petitioners and their supporting *amici* argue should apply here.

Had this seizure been effected other than in a public school, there would be no question that it was illegal and violated the Fourth Amendment. The exception the Petitioners seek to fall within here is

narrow and applies only when the detention is brief. That the target of the seizure was not suspected of any crime does not control, because government officials are not privileged to detain individuals against their will on the basis that those persons may have information helpful in ferreting out criminal activity. "It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 530 (1967). Because, as discussed *infra*, the school context does not justify the kind of seizure at issue here, the judgment below that the Petitioners violated the Fourth Amendment should be upheld.

II. CHILDREN IN PUBLIC SCHOOLS ARE NOT IN THE CUSTODY OF THE GOVERNMENT TO SUCH AN EXTENT THAT SEIZURES OF THE KIND AT ISSUE IN THIS CASE CAN BE DEEMED CONSTITUTIONALLY INSIGNIFICANT

The arguments of Petitioners and their supporting *amici* that seizures of children at public schools like the one effected upon S.G. are justified by the fact that it occurred at public school is evidence of the pernicious societal trend of deeming children and their parents to have forfeited their constitutional rights by attending or sending their children to public schools. In its brief, *amicus* United States asserts that the liberty restrictions arising from the kind of seizure and questioning

S.G. was subjected to "arise primarily from the custodial aspects of public schooling" (Brief for the United States at 26), suggesting that school children are and must expect to be under the complete control of government agents, whether or not associated with the school or carrying out a public education function, with respect to their personal liberty. Other *amici* go so far as to argue that the Fourth Amendment is not implicated whatsoever by the detention and questioning of S.G. because it was equivalent to the kind of limitation on the child's liberty and privacy inherent in public school attendance (Brief of California State Assoc. of Counties, and League of California Cities at 20). Thus, a cornerstone of the arguments supporting the Petitioners is that the privacy and personal security of students is so limited when attending public schools that the protections of the Fourth Amendment are effectively irrelevant (Brief of the United States at 31).

However, the American constitutional system long ago rejected any notion that a child is "the mere creature of the State" and, on the contrary, has affirmed that that parents generally have the right to control and custody of their children. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925). *See also Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972). Indeed, the idea that students have no personal privacy interests protected by the Fourth Amendment was explicitly rejected in *New Jersey v. T.L.O.*, 469 U.S. 329 (1985), even as applied to the actions of school officials carrying out school disciplinary functions.

While the Petitioners and their supporters would have this Court hold, explicitly or implicitly, that public school students are subject to the control and custody of *any* government official for *any* governmental purpose, this invitation must be resisted. As Justice O'Connor wrote, "if we are to mean what we often proclaim—that students do not 'shed their constitutional rights at the schoolhouse gate,' *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969)—the answer [to this invitation] must plainly be no." *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 681 (1995) (O'Connor, J., dissenting).

A. Children in Public Schools Retain a Liberty Interest to be Free From Seizures Unrelated to Discipline or Another School Interest

Even if the Fourth Amendment rights of students in public schools may be "different", *Acton*, 515 U.S. at 656, they are not nonexistent. More importantly, the limitation on the liberty of public school students and qualification of their Fourth Amendment rights that this Court has recognized is based upon the maintenance of "swift and informal disciplinary procedures needed in schools." *T.L.O.*, 469 U.S. at 340. Children's privacy rights vis-à-vis teachers and administrators are lessened because of "the substantial need of teachers and administrators for freedom to maintain order in the schools." *Id.* at 341. Restrictions on the liberty and privacy of students are justified by the need to preserve a "'proper educational environment,'" *Acton*, 515 U.S. at 655 (quoting *T.L.O.*, 469 US. at

339), and to allow school authorities to "inculcate the habits and manners of civility." *Acton*, 515 U.S. at 655 (quoting *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986)). "A student's privacy interest is limited in the public school environment where the State is responsible for maintaining discipline, health and safety. . . . Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults." *Bd. of Educ. Of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 830-31 (2002).

In this case and others involving abuse investigations, the interests in school order and student discipline are not implicated and can in no way be used as a justification for the seizure of the student. Although the Petitioners and their supporting *amici* rely upon *Acton* and other cases upholding invasions of the privacy rights of public school students as grounds for applying a limited privacy right for S.G. and other students, in each of those cases the invasion was tied to a legitimate interest of the public schools. S.G. was seized and questioned about intimately personal matters not because of any need or desire to maintain school discipline and order, but in order to investigate alleged criminal conduct that took place outside of the school. Indeed, the seizure was not even initiated by school officials; it was at the instigation of child welfare and law enforcement officials.

Because a child abuse investigation such as the one involving S.G. has no nexus to school order or discipline, the limitation on student Fourth

Amendment rights recognized in cases like *T.L.O.*, *Acton*, and *Earls* may not be used to justify the seizure at issue here or similar seizures undertaken for a law enforcement purpose. Just as the scope of a search must be strictly tied to and justified by the circumstances justifying its inception, *Terry*, 392 U.S. 18, so also any qualification of an individual's liberty and privacy must be tied to the circumstances justifying the qualification. The Petitioners were not acting in the interest of school discipline or order, which may require prompt and immediate action that makes pre-seizure judicial intervention impracticable.

The suggestion that students in public schools are already in the custody of the state to an extent that is equivalent to an arrest, thereby allowing government officials to impose additional restrictions on student liberty as they see fit and for any governmental purpose, must be rejected. Indeed, the Court remarked in *T.L.O.*, 469 U.S. at 338-39, "we are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment."

The decision in *Ingraham v. Wright*, 430 U.S. 651 (1977), specifically rejected the idea posited by Petitioners that students have little or no liberty interests upon attending public schools. In ruling that there was no need to extend the Eighth Amendment's prohibition on cruel and unusual punishment to students, the Court noted:

> Though attendance may not always be voluntary, the public school remains an

> open institution. Except perhaps when very young, the child is not physically restrained from leaving school during school hours; and at the end of the school day, the child is invariably free to return home. Even while at school, the child brings with him the support of family and friends and is rarely apart from teachers and other pupils who may witness and protest any instances of mistreatment.

Ingraham, 430 U.S. at 670.

Justice Alito rejected a similar suggestion in *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring), that any and all student speech that interferes with a school's "educational mission" may be censored, pointing out that such an argument could be easily manipulated in dangerous ways. "It is a dangerous fiction to pretend that parents simply delegate their authority--including their authority to determine what their children may say and hear--to public school authorities." *Id.* at 423. It would be just as dangerous to hold that public school custody of students entails a degree of restraint that is no different from an arrest.

Amicus United States finds support for its argument in the reference to the doctrine of *in loco parentis* in *Acton*, 515 U.S. at 654-55, and the presumed delegation of parental authority to public school officials. But the *Acton* decision immediately thereafter disclaimed the idea that the state has the kind of power over public school students which

justifies wholesale elimination of the liberties of students. *Id.* at 655 (degree of school control over students is not so extensive as to give rise to a constitutional duty to protect). Moreover, the idea of a voluntary delegation of parental authority underlying the *in loco parentis* justification has no basis in current realities. "*In loco parentis* assumes a voluntary delegation of parental authority and was envisioned during a time of either home-schooling tutors or small residential, private schools. The doctrine is now anachronistic in an era of involuntary delegation occasioned by compulsory attendance laws and of large public schools with responsibilities that often go beyond educational function." Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused and in Need of Change*, 78 U. Cin. L. Rev. 969, 971 (2010).

B. Government Restraint on Public School Students' Liberty Is a Dangerous Trend and Should Not Be Extended by Recognizing That the Seizure of S.G. Was Legal

The suggestion that children sent to public schools are essentially "in custody" in the strictest sense, subject to the control of government officials for whatever purpose the officials deem appropriate, is symptomatic of a larger trend of government officials deeming public school students surrendered to the state and open to any use or manipulation deemed beneficial by the state. Contrary to the long-established warning that children are not "creatures of the state", incidents from around the

country demonstrate that governmental authorities increasingly deem public school students their wards in defiance of the individual liberty of students and their parents. The Rutherford Institute, as a resource for students and parents on their civil rights, receives numerous reports each year of public school arrogation of authority and power over children, such as the following:

- In April of this year, authorities in Springfield, Missouri conducted mass, suspicionless searches at a high school. Authorities brought in drug-sniffing dogs to scan the persons and effects of students. Students reported that their backpacks and other belongings were opened and rummaged through in the course of the "lock down" even though no drugs were found in their belongings. School officials publicly stood by the lock down and search as part of their responsibilities as educators and in order to protect students. *See* http://articles.kspr.com/2010-09-27/search_24122704. *See also Doe ex rel. Doe v. Little Rock Sch. Dist.*, 380 F.3d 349 (8th Cir. 2004) (finding unconstitutional a school district policy of conducting random, suspicionless searches of students' persons and belongings despite school's generalized concern about drugs and weapons);
- In Indiana, and elsewhere around the country, schools subjected students to a psychological examination called "TeenScreen" without obtaining the actual consent of parents. "TeenScreen" involves

invasive questions about the students' personal behaviors, family life, thoughts, and feelings. While student responses were purportedly confidential, the responses were used to make on-the-spot diagnoses of the students' mental health. Moreover, students were told they suffered from serious psychological conditions, such as obsessive compulsive disorder and social anxiety disorder, without consulting with parents. *See Rhoades v. Penn-Harris-Madison Sch. Corp.*, 574 F. Supp. 2d 888 (N.D. Ind. 2008);

- Virginia's Attorney General recently issued an opinion that school officials may seize and search the information contained on a student's cell phone or other personal electronic device in order to investigate a suspicion that the student has engaged in "cyber bullying" or "sexting." Va. Atty. Gen. Op. 10-105, 2010 WL 4909931 (Nov. 24 , 2010). The opinion gives virtually no recognition to the privacy rights of students or guidance to school officials in determining when they have sufficient evidence to give rise to reasonable suspicion (such as corroborating evidence of an accusation). Instead, the opinion stresses that school searches present "special needs" (without any discussion of limitations on that doctrine) and is effectively a general invitation to school officials to search the belongings of students whenever they are worried about wrongdoing.

These incidents and the arguments in support of Petitioners that S.G. really was not

seized in any significant way because she was already in state custody evidence the dangerous trend afoot to turn schools into virtual police states. The liberties supposedly guaranteed by *Tinker*'s admonition that students do not shed their constitutional rights when they enter public schools are quickly vanishing. "The consequences for students have been enormous, from increasing restrictions on student speech to loosening restrictions on how schools can conduct student searches. Schools have been given license to reach the outer boundaries of control by courts' countenancing institutional and official behavior that is farther and farther from the reaches of professional conduct." Stuart, *supra*, at 997. As pointed out by one commentator, "[t]he states, through a combination of compulsory attendance laws and *in loco parentis*-inspired policies, have 'bootstrapped' themselves into possessing a right to infringe on the personal liberties of students in a manner similar to a parent." Comment, *Student Drug Testing: The Blinding Appeal of In Loco Parentis and the Importance of State Protection of Student Privacy*, 2008 B.Y.U. Educ. & L.J. 251, 272 (2008).

The harm caused by attitudes and policies that treat public school students as state vassals is not simply only a short-term deprivation of individual rights. It also is a long-term inculcation of attitudes among our youth that civil liberties are luxuries that may be discarded at the whim and caprice of government officials if they deem doing so is for the "greater good." As this Court has warned, "'[t]hat [schools] are educating the young for

citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.'" *T.L.O.*, 469 U.S. at 334 (quoting *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

CONCLUSION

The public's desire to stop and prevent child abuse cannot be gainsaid, but the government interest in investigating criminal activity has never been deemed sufficient to override fundamental rights such as the right to bodily freedom. "Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v U.S.*, 277 U.S. 438, 479 (1928) (Brandeis, dissenting). The Petitioners' request for recognition of a special exemption from general Fourth Amendment principles should be denied, and the rights of students to their fundamental liberty interests should be reaffirmed by upholding the judgment below.

Respectfully submitted,

John W. Whitehead
Counsel of Record
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22901
(434) 978-3888
Counsel for *Amicus Curiae*

Nos. 09-1454, 09-1478

In The Supreme Court of the United States

BOB CAMRETA,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondents.

JAMES ALFORD, Deschutes County Deputy Sheriff,

Petitioner,

v.

SARAH GREENE, personally and as next friend for S.G., a minor, and K.G., a minor,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE SOCIETY OF CATHOLIC SOCIAL SCIENTISTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

STEPHEN M. KRASON
Counsel of Record
President, Society of
Catholic Social Scientists
FRANCISCAN UNIVERSITY
Steubenville, OH 43952
(740) 284-5377
catholicsocialscientists@gmail.com

TABLE OF CONTENTS

Page

Table of Authorities iii

Interest of the *Amicus Curiae* 1

Summary of the Argument 2

ARGUMENT 3

I. Due to the Fundamental Character of Parental Rights, State Intervention Into the Family and Interference with Parental Decision-making Should Be Permitted Only When Absolutely Necessary, Pursuant to a Compelling State Interest, and then Should Be Carried Out in a Reasonable Manner 3

A. The Philosophical Foundations of Parental Rights 6

B. Catholic Church Teaching on Parental and Family Rights 8

II. The Decades-Long Experience with the CPS Shows its Basic Arbitrariness and Systemic Violation of Parental Rights 10

III. The Nature of the Interrogation of S.G. Violated Her Dignity as a Person, and thereby Her Fundamental Human Rights, and Also Went Against Constitutional Precedent 15

TABLE OF CONTENTS – Continued

Page

CONCLUSION 18

TABLE OF AUTHORITIES

Page

CASES:

Adamson v. California, 332 U.S. 46 (1947) 5

Calder v. Bull, 3 Dall. 386 (1798) 5

Greene v. Camreta, Alford, et al., No. 06-35333 (9th Cir., 2009) 9, 12

Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) 3

Rochin v. California, 342 U.S. 165 (1952) 17

Santosky v. Kramer, 455 U.S. 743 (1982) 4

Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) 4

Smith v. Organization of Foster Families, 431 U.S. 816, 845 (1977) 4

Stanley v. Illinois, 405 U.S. 645, 651 (1972) 3-4

Troxel v. Granville, 530 U.S. 572 (2000) 3, 4, 5

Wisconsin v. Yoder, 406 U.S. 205, 230 (1972) 4, 5

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

The Child Abuse Prevention and Treatment Act of 1974 (CAPTA - "Mondale Act"), Pub. L. No. 93-247, 88 Stat. 5 (codified as 42 U.S.C. Secs. 5101-5107) 11, 13

CATHOLIC CHURCH DOCUMENTS:

Catechism of the Catholic Church (1994)..... 8, 16

Holy See, Charter of the Rights of the Family (1983)..... 8

Pontifical Council for Justice and Peace, *Compendium of the Social Doctrine of the Church* (2004) 15-16

Pope John XXIII, *Peace on Earth* (1963)..... 6-7

Pope John Paul II, *Apostolic Exhortation on the Family* (1982)..... 8

Pope Leo XIII, *Rerum Novarum* (1891)..... 9

Pope Pius XI, *Reconstructing the Social Order* (1931)..... 1, 7

TABLE OF AUTHORITIES – Continued

Page

OTHER SOURCES:

Affidavit of S.G. in *Greene v. Camreta, Alford, et al.* (Civ. No. 05-6047-AA, District of Oregon, 2006) . 17

Aristotle, *The Politics* 7

Douglas J. Besharov, "Child Abuse Realities: Over-Reporting and Poverty," 8 *Va. J. of Soc. Policy and the Law* 165 (2000) 11, 15

Besharov, "'Doing Something' about Child Abuse: The Need to Narrow the Grounds for State Intervention," 8 *Harvard J. of Law and Pub. Policy* 539 (1985) 14,17

Paul Chill, "Burden of Proof Begone: The Pernicious Effect of Emergency Removal In Child Protective Proceedings," 41 *Family Court Review* 457 (2003) 13, 15, 17, 18

David F. Forte, "Natural Law and the Limits to Judicial Review," 1 *Catholic Soc. Sci. Rev.* 42 (1996) 5

TABLE OF AUTHORITIES – Continued

Page

Joseph Goldstein, Anna Freud, & Albert Solnit, *Beyond the Best Interests of the Child* (1973)... 17-18

Thomas J. Higgins, *Man As Man: The Science and Art of Ethics* (rev. ed.) (1992)..... 6

Stephen M. Krason, "A Grave Threat to the Family: American Law and Public Policy on Child Abuse and Neglect," in Stephen M. Krason, *The Public Order and the Sacred Order* (2009) 155-188..... 10, 11, 12, 13, 14, 15

Stephen M. Krason, "The Critics of the Current Child Abuse Laws and the Child Protective System: A Survey of the Leading Literature," 12 *Catholic Soc. Sci. Rev.* 307 (2007) 11, 12

Stephen M. Krason, "Child Abuse and Neglect: Failed Policy and Assault on Innocent Parents," 10 *Catholic Soc. Sci. Rev.* 215 (2005)..... 14

John H. Langbein, "Torture and Plea Bargaining," 46 *Univ. of Chicago L. Rev.* 4 (1978) 16

Dana Mack, *The Assault on Parenthood* (1997)..... 8, 12, 17

Winston P. Nagan & Lucie Atkins, "The International Law of Torture: From Universal

TABLE OF AUTHORITIES – Continued

Page

Proscription to Effective Application and Enforcement," 14 *Harvard Hum. Rts. Jour.* 87 (2001)..... 16

Mary Pride, *The Child Abuse Industry* (1986)..... 13

Paul Craig Roberts & Lawrence M. Stratton, *The Tyranny of Good Intentions* (2000)..... 16

E.F. Schumacher, *Small Is Beautiful: Economics as if People Mattered* (1973)..... 7

Brenda Scott, *Out of Control: Who's Watching Our Child Protection Agencies?* (1994) 10, 11, 12, 13, 14, 15

Society of Catholic Social Scientists *Amicus Curiae* Brief in *Troxel v. Granville*..... 3, 7

UN Universal Declaration of Human Rights..... 16

Raphael T. Waters, "The Basis for the Traditional Rights and Responsibilities of Parents," in Stephen M. Krason & Robert J. D'Agostino, eds., *Parental Rights: The Contemporary Assault on Traditional Liberties* 13-38..... 6, 7

Richard Wexler, *Wounded Innocents* (1990) 12

TABLE OF AUTHORITIES – Continued

Page

John W. Whitehead, *Parents' Rights* (1985) 5

INTEREST OF THE *AMICUS CURIAE*[1]

The Society of Catholic Social Scientists ("SCSS") respectfully submits this *amicus curiae* brief in support of the Respondents, Sarah Greene, et al. We believe that the questions presented in this case have serious implications for American law and public policy relating to the rights of parents, the integrity of the family, and the powers of government. They concern the dignity and rights of the human person and the family, which are central to Catholic social and moral teaching.

The SCSS is an interdisciplinary association of Catholic social scientists, devoted to upholding the teachings of the Church. Its purposes are to pursue and produce objective knowledge about the social order, evaluate contemporary social science work in light of Catholic social teaching, consider how this teaching might be applied to the problems of modern society, encourage distinctively Catholic scholarship in the social sciences, and (where appropriate) to put the tools of social science at the service of the Church's evangelizing mission. These purposes reflect Pope Pius XI's call eighty years ago for "the building up of a true Catholic social science." Pope Pius XI, *Reconstructing the Social Order* (1931). The SCSS carries out its programs by such means as conferences, a week-long summer institute, an

---

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. Letters of consent are on file at the Court.

annual scholarly journal (*The Catholic Social Science Review*), a book series and other publications, and an M.Th. program in Catholic Social Thought through the Graduate Theological Foundation.

SUMMARY OF THE ARGUMENT

The fundamental rights of parents to direct and control the upbringing of their children and the integrity and liberty of the family have been recognized time and again by this Court. These rights and this liberty are not mere creatures of the state or positive law, but are grounded in the natural order of things. The family has the end or purpose of developing good human persons and good citizens. Parents' rights are necessary for them to pursue this high calling and duty. As such, the state may not interfere with parental decision-making except in grave cases when it is truly necessary to prevent genuine harm.

The child protective system ("CPS"), from its inception almost forty years ago, has intervened with abandon into families across the country, often even removing children from the custody and control of their parents without justification. It has done so on the basis of vague and overbroad statutes on, and confused official notions about, child abuse and neglect. Some CPS practices, as in the present case, have been harmful to the very children it claims to be protecting. Due to legal immunity, its operatives have been largely unaccountable for their routine violations of parental rights, unwarranted intervention into the family, and readiness to accuse

the innocent. There is a crucial need for this Court to establish a standard that permits the abridgement of parental rights and CPS intervention into the family only when there is a compelling state interest.

ARGUMENT

I.

Due to the Fundamental Character of Parental Rights, State Intervention Into the Family and Interference with Parental Decision-making Should Be Permitted Only When Absolutely Necessary, Pursuant to a Compelling State Interest, and then Should Be Carried Out in a Reasonable Manner.

To begin, it is worth quoting what the SCSS stated in its *amicus curiae* brief in support of the Respondent in *Troxel v. Granville,* 530 U.S. 57: "This Court has held and re-affirmed that the rights of parents to direct and control the upbringing of their children without unjustified intrusion or oversight by the State are fundamental and sit at the heart of the 'liberty' protected by the Fourteenth Amendment's due process clause." Brief, at 4. This Court has spoken about the liberty of parents and guardians to direct the upbringing and education of their children. *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925). It has called it "cardinal...that the custody, care and nurture of the child reside first in the parents whose primary function and freedom...the state can neither supply nor hinder."

Stanley v. Illinois, 405 U.S. 645, 651 (1972). In *Troxel*, this Court stated that, "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children" and that it "is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel*, at 66, 65. This Court has also included parental rights among the "basic civil rights of man." *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and has indicated that they are "intrinsic human rights." *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977). This suggests awareness by this Court that parental rights, as important as they have been in American constitutional law, are not grounded exclusively or fundamentally in that but in the natural order of things—the natural law, to be sure—as this brief goes on to explain.

To be sure, this Court has never held that parental rights are absolute, that there can never be occasions when they may be abridged by the state. *See*, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 230 (1972). Indeed, there are circumstances when these rights may even be outright terminated, even though the state must meet a significant evidentiary burden to do so. *See Santosky v. Kramer*, 455 U.S. 743 (1982). In spite of such statements as the above in its opinions, some members of this Court have been reluctant to accord parental rights the same level of constitutional recognition and protection as rights specifically enumerated in the Bill of Rights because of an apparent concern about judicial arbitrariness.

See, e.g., *Troxel*, at 91-93 (J. Scalia dissent). These concerns are well taken, but not justified. If unenumerated rights are solidly grounded in the common law tradition—and thereby clearly identifiable—these dangers are much attenuated. Such is the case with parental rights. *See* John W. Whitehead, *Parents' Rights* 85-86 (1985). Even if one sees parental rights as ultimately grounded in natural law, as discussed below, this should not be the basis of concern that giving them strong legal protection would open the door to arbitrariness. While the debate about a natural law-based jurisprudence is an old one in this Court (*see*, e.g., *Calder v. Bull*, 3 Dall. 386 [1798], *Adamson v. California*, 332 U.S. 46 [1947]), judges relying on a sound notion of natural law are much less likely to slip into arbitrariness than those of a more positivistic bent. This is because of their understanding that judicial decisions must be grounded in sound, perennial principles transcending their mere will. *See* David F. Forte, "Natural Law and the Limits to Judicial Review," 1 *Catholic Soc. Sci. Rev.* 42-47 (1996).

Moreover, even though this Court has repeatedly recognized parental rights as fundamental, it has been hesitant to say in specific terms—at least in the absence of a corresponding claim of free exercise of religion (*see Wisconsin v. Yoder*, *supra*)—that a compelling state interest is required for their infringement. We believe that the fundamental nature of these rights and the crucial importance of the family to a sound political order, as discussed *infra*, require that this finally be done.

A. The Philosophical Foundations of Parental Rights.

As one philosopher puts it, while mutual love and mutual aid are sought in the marital state the human species also has the inclination to reproduce itself. Once conjugal rights are assumed the parents take on "an obligation which their natures and the nature of the domestic society [the family] have imposed on them: to accept full responsibility for continuing the process of producing a new man." Nature has provided the wherewithal for parents to carry out the arduous tasks associated with childrearing. "The mutual love of the parents, the aid they can give to each other...are a proper climate for the nestling," so childrearing is done "best in family life where there exist two people who love the offspring more than anyone else can." Raphael T. Waters, "The Basis for the Traditional Rights and Responsibilities of Parents," in Stephen M. Krason & Robert J. D'Agostino, eds., *Parental Rights: The Contemporary Assault on Traditional Liberties*, 21, 23, 26 (1988). To carry out the duties involved in the rearing and education of offspring requires rights. Nature would be providing very insufficiently for man if upon imposing duties or obligations on him it did not give him corresponding prerogatives—i.e., rights—to enable him to carry out those duties. By their very nature rights and duties are linked, and must be respected by other persons and the community. *See* Thomas J. Higgins, *Man As Man: The Science and Art of Ethics* (rev. ed.), 226-227 (1992); Pope John XXIII, *Peace on Earth* #28-30

(1963). Thus, sound philosophy recognizes the natural rights of parents. Waters, 25-26.

There is yet another ethical consideration. As is indicated *supra*, parents in the nature of things are better able to carry out tasks and decision-making within the family than are outside and distant entities such as the state. The principle of subsidiarity in social ethics is pertinent: "[I]t is an injustice and at the same time a grave evil and a disturbance of right order, to transfer to the larger and higher collectivity functions which can be performed and provided for by lesser and subordinate bodies." Pope Pius XI, *supra* #79; *see also* E.F. Schumacher, *Small Is Beautiful: Economics as if People Mattered* 244 (1973). This principle stands behind the familiar American notion of federalism, but "applies to family-state relations as well as to relations between different levels of government." SCSS A.C. Brief in *Troxel* 9.

Even apart from the matter of the natural rights of parents, the state should respect family integrity for its own benefit. Aristotle stressed the character-building role of the family. As such, it is the spawning ground of good social and political relations; it helps form good citizens. *See* Aristotle, *Politics* II, iii; II, iv.

Despite the stress on parental rights and family integrity in our ethical and legal background, including the decisions of this Court, it is clear that the state is intruding on these in a wholesale way today. This was strikingly seen in the results of an extensive study undertaken by the Institute for American Values, which showed that most American

parents nowadays *take for granted* that the state has absolute power to monitor their families, shape their child-rearing practices, and even remove their children from them. *See* Dana Mack, *The Assault on Parenthood*, 62 (1997). This is especially illustrated by the facts about the child protective system (CPS) *infra*, which was involved in the present case and is a major source of such interference with the family.

B. Catholic Church Teaching on Parental and Family Rights.

While the philosophical and ethical discussion *supra* makes clear that parental rights do not have their basis just in specific religious traditions, they are strongly upheld by Catholic teaching. The Church teaches that the family "is the *original cell of social life*" *Catechism of the Catholic Church* #2207 (1994) (emphasis in original). It is "the first school of the social virtues that are the animating principle of the existence and development of society itself." Pope John Paul II, *Apostolic Exhortation on the Family*, III, iii (1982). It is incumbent upon the state to "respect and foster the dignity, lawful independence, privacy, integrity, and stability of every family." Holy See, Charter of the Rights of the Family, art. 6 (1983). Attempts by the state or even private organizations "in any way to limit the freedom of couples in deciding about their children constitute a grave offense against human dignity and justice." Id., art. 3. Still, the Church agrees with this Court's precedents that parental rights and family independence are not absolute. Pope Leo XIII, who

set out the modern social teaching of the Church, specified the criteria for what today would be called state intervention into the family: The state may not "at its option intrude into and exercise intimate control over the family." It may do so only when it is in "exceeding distress, utterly deprived of the counsel of friends, and without any prospect of extricating itself," or "if within the precincts of the household there occur grave disturbances of mutual rights." Pope Leo XIII, *Rerum Novarum* #14 (1891). As the discussion *infra* makes clear, the CPS routinely and sweepingly oversteps such bounds.

While it is indisputable that the possibility of sexual abuse, as in the present case, would involve such a "grave disturbance of rights" justifying state intervention, it does not follow that the state may simply disregard parental rights and conduct an investigation of the family in an unreasonable manner. Specifically, the state did not have the right to conduct a intensive, pressuring, and suggestive interrogation of the child (S.G.) in a threatening and extended manner, without the consent of her mother, the Respondent Sarah Greene– who was in no way suspected of any illegal or improper actions-- or the sanction of a court order. It did not have the right to prod and "grind down" the child until she gave them an answer that its operative wanted, which S.G. says is what happened. *See Greene v. Camreta, Alford, et al.*,. No. 06-35333 (9th Cir.), at 16303. By the way, this Court should not think that such CPS practices were unique to this case or to sexual abuse allegations. There is abundant evidence that they are not uncommon for the CPS

around the country. *See* Brenda Scott, *Out of Control*, chap. 8 (1994); Stephen M. Krason, "A Grave Threat to the Family: American Law and Public Policy on Child Abuse and Neglect," in Krason, *The Public Order and the Sacred Order* 178 (2009). If this Court overturns the 9th Circuit and closes off the opportunity to hold the CPS accountable for its actions under federal civil rights laws—as it is, the CPS and its operatives generally are immune from tort lawsuits and typically use confidentiality requirements designed to protect families to avoid transparency (*see* id., 170-172)—it may have the effect of stimulating more such troublesome investigatory practices. Most of the latter take place pursuant to the massive number of unfounded reports of alleged abuse and neglect involving mostly innocent parents each year (*see infra*). The CPS may interpret such a decision as a kind of imprimatur from this Court for its conduct.

II.

The Decades-Long Experience with the CPS Shows its Basic Arbitrariness and Systemic Violation of Parental Rights.

The numbers of false reports of child abuse and neglect each year are staggering. Douglas Besharov of the University of Maryland, perhaps the leading scholarly authority on the CPS, writes that consistently over the years approximately two-thirds of child abuse and neglect reports nationwide are

unsubstantiated or unfounded. Besharov, "Child Abuse Realities: Over-Reporting and Poverty," 8 *Va. J. of Soc. Policy and the Law* 165, 179-180 (2000). Other critical assessments of the CPS agree with this figure. *See* Stephen M. Krason, "The Critics of the Current Child Abuse Laws and the Child Protective System: A Survey of the Leading Literature," 12 *Catholic Soc. Sci. Rev.* 307, 340 (2007). In 1997—not an atypical year—that amounted to almost 1.98 million false reports involving over 2 million children. Besharov, "Child Abuse Realities," at 176, 179-180. Besharov points out, "the rate of substantiated reports has definitely declined, even while the total number of reports keeps increasing." Id., 179. Even most of the "substantiated" reports involve minor matters. Scott, 29-33. Moreover, the lack of certainty and clarity about what constitutes child abuse and neglect in state statutes—spawned by the federal Child Abuse Prevention and Treatment Act (CAPTA - the "Mondale Act") of 1974—suggests that the estimates of the number of unfounded reports may actually be understated. *See* Krason, "A Grave Threat," 245-250. While not pertinent to the facts of the present case, it is troublesome that courts have been reluctant to apply the vagueness and overbreadth analysis used in other areas of the law to the child abuse/neglect statutes (*see* id., 166) when it is apparent that perfectly normal and legal parental behaviors are what trigger most CPS investigations. The context of the present case, however, would permit this Court to firmly and clearly mandate the need for a compelling state interest before parental rights may

be abridged. If such a constitutional requirement were in place, the regimen of easy, unjustified CPS intervention into families would likely be attenuated.

Other factors besides the vagueness of the statutes are responsible for this problem. One is the legal immunity of CPS operatives (noted *supra*) and also of "mandatory reporters" (e.g., physicians, nurses, psychologists, counselors), who must report even "suspected" abuse and neglect (without, again, clearly defining it). Krason, "A Grave Threat" 171. Another is that the CPS operatives and mandatory reporters *are unable to agree among themselves* about what constitutes abuse and neglect. *See* id. 168-169; Richard Wexler, *Wounded Innocents* 86-87 (1990). Yet another reason is the long-term problem of insufficient qualifications of many CPS operatives. *See* Scott 57-59; Wexler 320; Mack 73.

The *unreliability and untrustworthiness* of the CPS is further suggested by other facts about how it operates. It has long exhibited the troubling perspective that parents cannot be trusted. *See* Krason, "A Grave Threat" 169. A survey of critical scholarly, legal, and journalistic writings about the CPS showed that most accused it of an anti-parent bias. Krason, "The Critics of the Current Child Abuse Laws," at 340. This is seen, by the way, in the present case in the interrogation of S.G. without her mother's, Respondent Sarah Greene's, consent and the barring of the latter from being present at the medical examination of S.G. *See Greene*, at 16306-16307. Next, contrary to a basic tenet of the Anglo-American legal tradition, once parents face a report

of abuse or neglect they are essentially presumed guilty, and bear the *de facto* burden of having to establish their fitness to parent their children to the satisfaction of the CPS. *See* Krason, "A Grave Threat," 160; Scott 131-134, 137. Even when cases get as far as juvenile court, parents are at a serious disadvantage when facing the CPS. Paul Chill, "Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings," 41 *Family Court Review* 457, at 460-461 (2003). Further, the CPS operates by a series of what one source calls "doctrines," which lack reasonableness, are sometimes contradictory, and often are not backed up by facts. One is that parents are to be blamed for everything concerning their children, and so the CPS is ready and even eager to find fault with them. More, it sees all parents as potential abusers. Another of its doctrines is that when a child states that a parent has been abusive—even if this comes after suggestive questioning—he is always telling the truth. By the same token, it holds that if a child later recants his allegation against a parent—as happened in the present case—the recantation is not reliable. Another doctrine, apparent in the present case, is that sexually abused children almost automatically cover up the abuse. Further, the CPS harbors the extravagant belief—ostensibly built from the beginning into CAPTA and its state statutory progeny—that it is somehow possible to identify any parent who is likely to abuse his or her child in the future, even if there has been no actual allegation of abuse. Mary Pride, *The Child Abuse Industry* 41-50 (1986). Besharov says that

such a claim is simply "unrealistic." Besharov, "'Doing Something' about Child Abuse: The Need to Narrow the Grounds for State Intervention," 8 *Harvard J. of Law and Pub. Policy* 539, 574-575 (1985).

Beyond its unreasonable doctrines, the CPS shows its untrustworthiness and unreliability in other ways: 1) It almost routinely assumes the veracity of almost any abuse/neglect report it receives, even those coming from anonymous hotlines. Scott 134; Krason, "A Grave Threat" 171. For the most part, no probable cause-type standard is required to launch an investigation of a parent. Stephen M. Krason, "Child Abuse and Neglect: Failed Policy and Assault on Innocent Parents," 10 *Catholic Soc. Sci. Rev.* 215, 222 (2005). 2) Prior to lower court decisions of the past several years, the CPS believed itself not subject at all to the Fourth Amendment as far as concerns its operatives entering and searching the private homes of families (see Krason, "A Grave Threat" 173-174). A different type of Fourth Amendment question, of course, is raised in the present case. 3) For a long time, the CPS embraced the highly questionable and now discredited "recovered memory" therapy, which claimed that therapists could tap suppressed memories in children of abuse even years in the past. Scott 147-148. 4) It frequently mistakes medical conditions of children for abuse. See Krason, "A Grave Threat" 162. 5) The lack of a reasonable definition of "abuse" and "neglect," epidemic of over-reporting, and the CPS's preoccupation with false allegations and insignificant matters frequently

diverts it from dealing with situations where children are genuinely endangered. In fact, a substantial percentage of children who die from maltreatment have had previous contact with the CPS. Besharov, "Child Abuse Realities," at 192. All this points to a system that is ineffective, counter-productive, and unaccountable, while at the same time violative of parental rights and family integrity. Moreover, it is also typically unwilling to acknowledge its failings or mistakes. *See*, e.g., Scott 38. It is often not even willing to permit the return of children once their parents have been exonerated. *See* Krason, "A Grave Threat," 160; Chill, at 460.

All of this makes it imperative that this Court decide that: 1) the CPS is not immune from federal civil rights liability, and 2) the CPS should be restrained from violating parental rights and intervening into the family unless it is able to show a compelling state interest.

III.

The Nature of the Interrogation of S.G. Violated Her Dignity as a Person, and thereby Her Fundamental Human Rights, and Also Went Against Constitutional Precedent.

The Catholic Church stresses the utter essentiality of upholding human dignity. "A just society can become a reality only when it is based on the transcendent dignity of the human person." *Compendium of the Social Doctrine of the Church*

#132 (2004). The Church holds, "the roots of human rights are to be found in the dignity that belongs to each human being." Id. #153. The Preamble of the UN Universal Declaration of Human Rights expresses this same belief of human rights as grounded in human dignity. *See* Univ. Decl. of H. Rts. Among the offenses that the Church teaches is against human dignity is torture, "which uses physical or moral violence to extract confessions, punish the guilty, frighten opponents, or satisfy hatred." *Catechism of the Catholic Church* #2297. Torture, of course, is condemned by the Universal Declaration (sec. 5) and is rejected by international law generally. *See* Winston P. Nagan & Lucie Atkins, "The International Law of Torture: From Universal Proscription to Effective Application and Enforcement," 14 *Harvard Hum. Rts. Jour.* 87, 95-102 (2001). Torture is defined as the infliction of physical or psychological pain and suffering "by a victimizer who dominates and controls." Id. 93. In the realm of criminal law, some writers have alleged that the use of, in effect, psychological torture by prosecutorial authorities to pressure defendants into plea bargains has become commonplace. *See* Paul Craig Robert & Lawrence M. Stratton, *The Tyranny of Good Intentions*, chap. 9 (2000); John H. Langbein, "Torture and Plea Bargaining," 46 *Univ. of Chicago L. Rev.* 4 (1978). We do not suggest that international law or standards have to be the basis for this argument. This Court has long made it clear that under the Constitution official conduct of the nature of torture violates due process and is not acceptable as a means of extracting evidence. *See*

Rochin v. California, 342 U.S. 165 (1952). While this has involved persons charged with crimes, how much more this standard must be held to apply to interrogations of innocent persons—indeed, supposed victims—and even more to children. Moreover, psychological torture is no less torture because it does not involve the direct infliction of physical pain. Often, as in the present case—where S.G. went home after the duress of the extended interrogation and vomited five times (*see* Affidavit of S.G. in District Court Case)—psychological torture has physical manifestations. Again, such CPS interrogation practices are not unique to this case.

While this episode vividly illustrates damage done to a child by CPS practices, the harm it does to children in so many other ways—when supposedly protecting them—is not always so readily observed but nevertheless is pronounced. One is the danger posed by the foster care arrangements that the CPS typically places children in when removing them from their homes. Besharov states, "Long term foster care can leave lasting psychological scars...it can do irreparable damage to the bond of affection and commitment between parent and child." Besharov, "'Doing Something,'" at 560. The rate of child maltreatment in foster care is considerably higher than in the general population. Chill, at 460; Mack, 67. Even if children are not taken from their parents, unwarranted intervention has such consequences for children as: "anxiety, diminishing trust, loosening of emotional ties, or an increasing tendency to be out of control." Joseph Goldstein, Anna Freud, & Albert Solnit, *Beyond the Best*

Interests of the Child 25 (1973). Psychological harm to children, parental anger toward their children, and increased family tensions can result. Id., 25, 72-74. The stresses caused sometimes lead to family break-ups. Chill, at 460. Thus, in many way the CPS assaults the dignity of the very children it claims to serve.

CONCLUSION

For all the foregoing reasons, *amicus curiae* the Society of Catholic Social Scientists (SCSS) urges this Court to affirm the judgment of the 9th Circuit and also to require a compelling state interest standard for abridgement of parental rights and intervention into the family.

Respectfully submitted,

STEPHEN M. KRASON
Counsel of Record
President, Society of Catholic Social Scientists
Franciscan University
Steubenville, OH 43952
(740) 284-5377
catholicsocialscientists@gmail.com

January 2011